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Supreme Court, U.S.
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No. 02 1655 MAY 7 - 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

CAL. A. TERHUNE, et al., *Petitioners,*

v.

KARLUK M. MAYWEATHERS, et al., *Respondents,*

UNITED STATES OF AMERICA, *Intervenor.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED

Under the Spending and Commerce Clauses, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) prohibits State prisons from imposing a substantial burden on a prisoner's religious exercise, even if the burden results from a rule of general applicability, unless the government meets its burden under the compelling government interest test. 42 U.S.C. § 2000cc-1(a) and (b).

This Court has held the compelling interest test is not applicable to a valid, neutral law of general applicability, *Employment Div., Dept. of Human Resources of Oregon v.* Smith, 494 U.S. 872 (1990), or a prison regulation affecting a prisoner's free exercise rights, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), and that Congress does not have the power to require such a standard under § 5 of the Fourteenth Amendment, *City of Boerne v. Flores*, 521 U.S. 507 (1997).

1. Does RLUIPA's application of a compelling interest test violate the separation of powers doctrine by usurping the Judiciary's power to define the scope of the Free Exercise Clause in the prison context?

2. Did Congress exceed its powers under the Spending and Commerce Clauses by requiring prisons to apply a compelling interest test to justify implementation of general and facially neutral regulations that happen to limit the religious practices of some inmates?

3. Does RLUIPA violate the Establishment Clause of the First Amendment?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are the former Director of the California Department of Corrections, Cal Terhune; former Warden of the California State Prison, Solano, Anthony Newland; Community Resources Manager for the California Department of Corrections, Barry Smith; former Community Resources Manager for the California State Prison, Solano, Michael Valdez; and former Assistant Food Manager at the California State Prison, Solano, Nelia Bennett.

Respondents

Respondents are Muslim inmates at the California State Prison, Solano; the class representatives are Terrance Mathews and Jamal Garner.

The United States is an intervening party, defending the constitutionality of the federal statute, RLUIPA.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. A) is reported at 314 F.3d 1062 (9th Cir. 2002), and the District Court's opinion (App. B) is reported at 2001 WL 804 140 (E.D. Cal. 2001). The District Court's orders granting preliminary injunctive relief (App. C, D) are unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit rendered its decision on December 27, 2002, and denied the petition for rehearing and petition for rehearing *en banc* on February 6, 2003 (App. E.) Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

Petitioners are serving this petition on the Solicitor General of the United States because the United States has intervened in this case to defend the constitutionality of the federal statute.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Religious Land Use and Institutionalized Persons Act of 2000 provides in relevant portions:

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–

(1) is in furtherance of a compelling interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which–

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-1(a) and (b).

§ 2000cc-5. Definitions.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

42 U.S.C. § 2000cc-5.

2. Spending Clause:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

U.S. Const. Art. I, § 8, cl. 1.

3. Commerce Clause:

[The Congress shall have the Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. Art. I, § 8, cl. 3.

4. The First Amendment provides in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...

U.S. Const. Amend. I.

5. Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

STATEMENT OF THE CASE

Muslim inmates at California State Prison, Solano, are pursuing this class action lawsuit against prison officials, claiming violations of their right to free exercise of religion under the First Amendment. After many years of litigation, the claims remaining in this case relate to the inmates' requests to leave their job assignments and earn sentence-reduction credits while attending Jumu'ah, the Muslim Friday prayer service, and wear one-half inch beards. State regulations prohibit inmates from earning sentence-reduction credits for activities other than work and educational programs. State regulations also prohibit inmates from wearing beards of any length for security reasons.

After this case was ready for trial, the District Court permitted the inmates to file a sixth amended complaint, adding a claim for relief under the recently enacted RLUIPA. Prison officials then filed a motion to dismiss the claims under RLUIPA on the grounds that the statute is unconstitutional, and defendants are entitled to Eleventh Amendment immunity from suit. The District Court notified the United States Attorney of the constitutional challenge to RLUIPA, and the United States intervened to defend the constitutionality of the statute.

In its order denying the motion to dismiss, the District Court found that RLUIPA is constitutional and rejected the prison officials' claim of entitlement to Eleventh Amendment immunity. (App. B.) Shortly thereafter, the District Court applied RLUIPA's legal standard to issue a fourth preliminary injunction regarding Jumu'ah services. The new injunction expanded previous injunctions by requiring prison officials to allow inmates who attend Jumu'ah services to earn sentence-reduction credits when they do so — contrary to facially neutral state regulations governing the California Department of Corrections' Work Incentive Program. (App. C.)[1]

Several months later, the District Court issued another preliminary injunction under RLUIPA, allowing Muslim inmates to wear one-half inch beards without being disciplined — contrary to state regulations prohibiting inmates from wearing beards of any length. Prior to the enactment of RLUIPA, California courts consistently upheld state grooming regulations. The District Court continues to issue successive injunctions relating to both Jumu'ah services and grooming regulations.

Prison officials appealed the District Court's orders granting the preliminary injunctions by challenging the

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1. Petitioner does not here challenge the inmates' right to attend the Friday Jumu'ah services, but challenges only the ruling that RLUIPA compels the State to award the inmates sentence-reduction credits when they attend the services. Petitioner also does not here seek review of the merits of the injunction under RLUIPA's compelling interest standard, but reserves the right to restore the status quo ante if this Court declares RLUIPA unconstitutional as prayed.

constitutionality of RLUIPA, as it applies to institutionalized persons in the prison setting. On appeal to the Ninth Circuit Court of Appeals, amicus briefs were filed for both parties. Nine other states filed an amicus brief, supporting the constitutional challenge to RLUIPA. The Ninth Circuit found that RLUIPA is a constitutional exercise of Congress' authority under the Spending Clause to provide for the general welfare and does not violate the Establishment Clause. (App. A.) In doing so, the Ninth Circuit did not address whether RLUIPA is a valid exercise of Congressional authority under the Commerce Clause. After the Ninth Circuit issued its decision, prison officials filed a petition for rehearing and petition for rehearing *en banc*. The Ninth Circuit denied the petition for rehearing. (App. E.) Prison officials are petitioning this Court for a writ of certiorari to resolve the issue of RLUIPA's constitutionality.

REASONS FOR GRANTING THE WRIT

The constitutionality of RLUIPA is a federal question of exceptional importance, significantly impacting the administration of prisons across the nation. Although RLUIPA's constitutionality is an issue of first impression, the statute represents a departure from this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), finding the predecessor statute, the Religious Freedom Restoration Act (RFRA),[2] unconstitutional. RLUIPA conflicts with this Court's interpretation of the Free Exercise Clause of the First Amendment, particularly in the context of prisons. The Ninth

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2. Pub. L. 103-141, 107 Stat. 1488, previously codified at 42 U.S.C. § 2000bb-1 (1994).

Circuit's decision sanctions the imposition of the compelling interest test on prison policies and regulations of general application on the basis of religion under the First Amendment's Free Exercise Clause, conflicting with this Court's holdings in *Employment Division v. Smith*, 494 U.S. 872 (1990), *Turner v. Safley*, 428 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

As a result of this conflict, other states have joined California prison officials in challenging RLUIPA because it significantly impacts how the states manage and operate their prisons and has created much confusion as to the state of the law. RLUIPA will require the prison system in California, as well as in states across the nation, to review and re-evaluate their policies and regulations to comply with its provisions. Resolution of the question of RLUIPA's constitutionality is necessary to provide consistency in the law governing religious exercise in prisons.

I.

THE PETITION SHOULD BE GRANTED BECAUSE RLUIPA USURPS THE POWER OF THE JUDICIARY TO DEFINE THE SCOPE OF THE FREE EXERCISE CLAUSE IN THE PRISON CONTEXT

A. The Ninth Circuit's Decision Conflicts With This Court's Interpretation Of The First Amendment By Applying A Compelling Interest Test To Justify Enforcement Of Generally Applicable and Facially Neutral Regulations That Happen To Affect The Religious Practices Of Some Individuals

By applying the compelling interest test to prisoners' religious exercise claims, RLUIPA conflicts with this Court's interpretation of the First Amendment's Free Exercise Clause. RLUIPA imposes the compelling interest test whether or not the challenged law or regulation involves a rule of general application, contrary to this Court's holding in *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, this Court held that the Free Exercise Clause does not apply to general and otherwise valid neutral laws that incidentally burden religious conduct. *Id.*

The Ninth Circuit acknowledges that RLUIPA was a response to *Smith*, and that it raises the standard set in *Smith* by providing additional protection for religious worship. The Ninth Circuit found that *Smith* permitted the Legislature to provide heightened protection for religious worship. In fact, this Court, in *Smith*, found that the Legislature might provide

for nondiscriminatory religious exemptions for practices such as the Native American sacramental use of peyote, but that such exemptions were not constitutionally required. *Id.* at 890. This Court particularly noted that this was preferred over a system in which judges weigh the social importance of all laws against the centrality of all religious beliefs. *Id.* at 886-887. That is, of course, exactly what RLUIPA does; it is not an exemption of a particular religious practice from a nondiscriminatory rule of general application, but rather it applies a legal standard that requires judges to weigh the importance of all neutral laws against all religious beliefs. *Smith* cannot be read for the broad proposition cited by the Ninth Circuit.

B. The Ninth Circuit's Decision Conflicts With This Court's Holding In *City of Boerne v. Flores* That Congress May Not Redefine The Substance Of The First Amendment's Free Exercise Clause

This Court previously found RLUIPA's predecessor, RFRA, unconstitutional. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). RFRA also adopted the compelling interest test as its legal standard. Although Congress possesses its broadest power to legislate under Section 5 of the Fourteenth Amendment, in *Boerne*, this Court found RFRA exceeded Congress' authority because it appeared to attempt substantive change in constitutional protections. *Id.* at 529, 532, 536. This Court reaffirmed that the power to interpret the Constitution in a case or controversy remains in the Judiciary. *Id.* at 524; *cf. Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age discrimination in Employment Act's adoption of the strict scrutiny standard was not an appropriate remedy

under section 5, but a redefinition of legal obligations); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Under Title I of American with Disabilities Act, Congress improperly imposed a higher burden on states to justify discrimination than would be required under the Fourteenth Amendment).

C. The Ninth Circuit's Decision Invades The Prerogatives Of State Prison Officials As Recognized By This Court In *Turner v. Safley*

RLUIPA also conflicts with this Court's analysis of prisoners' constitutional claims against State officials. *See Turner v. Safley*, 428 U.S.78 (1987). Under current constitutional law, state officials are given deference for prison administration. *Id.; O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). In *Turner*, this Court held the compelling interest test was unworkable in the prison environment because "every administrative judgment would be subject to the possibility that some Court somewhere would conclude that it had a less restrictive means of solving the problem at hand." *Id.* at 79. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. *City of Boerne v. Flores*, 521 U.S. 507, 509, 534 (1997). Thus, RLUIPA's application of the compelling interest test conflicts with this Court's interpretation of the First Amendment's Free Exercise Clause; specifically, this Court's interpretation of the Free Exercise Clause in the prison context.

II.

THE PETITION SHOULD BE GRANTED BECAUSE CONGRESS EXCEEDED ITS POWERS UNDER THE SPENDING AND COMMERCE CLAUSES BY ENACTING RLUIPA

In enacting RLUIPA, Congress relied on its authority under the Spending and Commerce Clauses. *See* 42 U.S.C. § 2000cc-1(b)(1) and (2). However, like its predecessor, RLUIPA is constitutionally deficient because it redefines the substance of the First Amendment's Free Exercise Clause.

Similar to other states, the California Department of Corrections receives funding for specific federal programs. Although none of the federal programs funded promote or have any relationship to religion or a general goal of rehabilitation, the Department is bound by RLUIPA's provisions.

Even though Congress does have broad powers under the Spending Clause, this Court has articulated specific limitations on Congress' Spending Clause authority. *South Dakota v. Dole,* 483 U.S. 203 (1987). In *Dole*, this Court upheld the challenged Spending Clause statute because the conditions on the federal funds were directly related to the purpose of the federal program funded. *Dole*, 483 U.S. at 208. Although this Court has not specifically addressed the parameters of the relatedness requirement, it is clear from its decisions that a reasonable relationship must exist between the conditions on federal funds and the federal program funded. *See Id.* at 213 (Justice O'Connor, dissenting); *New York v. United States,* 505 U.S. 144, 167 (1992) (citations omitted).

In upholding the constitutionality of RLUIPA under the Spending Clause, the Ninth Circuit questioned the validity of the relatedness requirement in *Dole*. The court's decision questions whether "relatedness" is even a standard imposed on Spending Clause legislation.

After questioning the validity of the relatedness requirement, the Ninth Circuit found RLUIPA meets any relatedness requirement because Congress has a strong interest in protecting the exercise of religion and promoting rehabilitation. However, the conditions RLUIPA places on the receipt of federal funds have no discernible relationship to the purpose of any specific federal programs receiving funding.

Such a broad reading of *Dole* renders any relatedness requirement meaningless. Because this Court has not clearly defined the relatedness requirement, RLUIPA raises an important question as to what parameters should or should not be imposed on Congress' authority to enact Spending Clause legislation.

III.

THE PETITION SHOULD BE GRANTED BECAUSE RLUIPA'S APPLICATION TO GENERALLY APPLICABLE AND FACIALLY NEUTRAL PRISON REGULATIONS VIOLATES THE ESTABLISHMENT CLAUSE

Even if RLUIPA meets the *Dole* relatedness requirement, its application, in the prison context, raises a serious question as to its validity under the First Amendment's Establishment Clause.

In a highly regulated environment, prisoners' daily activities and movements are governed by rules and regulations. As noted earlier, because of the unique nature of the prison environment, this Court developed a "rational-relationship" test to govern claims that a prison regulation or action of a prison official burdens a prisoner's constitutional rights. *See Turner v. Safley*, 428 U.S. 78 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). This approach affords prison officials deference to determine how to properly manage prisons and prevents the Judiciary from running the prison system. *Turner*, 428 U.S. at 89.

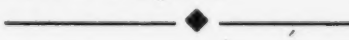
RLUIPA's application of a compelling interest standard in evaluating Free Exercise challenges to prison regulations elevates prisoners' religious rights over all other fundamental rights. The Government is itself acting to advance the religious rights of inmates by withholding federal funds from states that refuse to follow RLUIPA's mandate. Under the First Amendment, Congress is prohibited from making laws

that respect the establishment of religion. States must pursue a course of neutrality toward religion, favoring neither one religion over others, nor religious adherents collectively over nonadherents. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994). Government may neither favor or punish those who practice a religion. *Wallace v. Jaffree*, 472 U.S. 38, 53 n. 37 (1985) (*quoting Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)).

The Ninth Circuit found that RLUIPA serves a "secular legislative purpose" and accommodates religion by protecting the exercise of religion in institutions from unwarranted and substantial infringement. But far more is involved than mere "accommodation."

RLUIPA "accommodates" religion by mandating use of a legal standard that, as a matter of general application, favors the interest of the exercise of religious practices by some inmates over the legitimate penological interests of prison officials in providing for the safety and security of all inmates — regardless of religion. Under RLUIPA, prison officials may only substantially burden a prisoner's individual exercise of religion if the officials have a compelling interest in doing so and use the least restrictive means possible.

Indeed, RLUIPA advances religion by broadly exempting inmate religious groups from general and neutral prison regulations. The Establishment Clause prohibits such broad preferential treatment of religion.



CONCLUSION

Petitioners respectfully request this Court grant this petition for a writ of certiorari to resolve this important and divisive issue.

Respectfully submitted,

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APPENDIX A

314 F.3d 1062

United States Court of Appeals,
Ninth Circuit.

Karluk M. MAYWEATHERS; Dietrich J. Pennington; Jesus Jihad; Terrance Mathews; Aswad Jackson; Ansar Kees, Plaintiffs-Appellees,
and
United States of America, Intervenor,
v.
Anthony C. NEWLAND, individually and in his official capacity; Barry Smith, individually and in his official capacity; Cal A. Terhune; N. Bennett; M.E. Valdez, Defendants-Appellants.
Karluk M. Mayweathers; Dietrich J. Pennington; Jesus Jihad; Terrance Mathews; Aswad Jackson; Ansar Kees, Plaintiffs-Appellees,
v.
Anthony C. Newland individually and in his official capacity; Barry Smith, individually and in his official capacity; Cal A. Terhune; N. Bennett; M.E. Valdez, Defendants-Appellants.
Karluk M. Mayweathers; Dietrich J. Pennington; Jesus Jihad; Terrance Mathews; Aswad Jackson; Ansar Kees, Plaintiffs-Appellees,
v.
Cal A. Terhune; A.C. Newland; Barry Smith; Bonnie Garibay; N. Fry; M.E. Valdez; N. Bennett; F.X. Chavez, Defendants-Appellants.

Nos. 01-16505, 01-16607, 01-17133.
Argued and Submitted Sept. 11, 2002.
Filed Dec. 27, 2002.

A class of Muslim state prisoners sought relief under, inter alia, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) for alleged violations of the right to the free exercise of their religion, and defendant state prison officials moved to dismiss, challenging the facial constitutionality of the Act. The United States District Court for the Eastern District of California, Lawrence K. Karlton, Senior Judge, 2001 WL 804140, denied the motion, and defendants appealed. The Court of Appeals, D.W. Nelson, Senior Circuit Judge, held that: (1) RLUIPA is a legitimate exercise of Congressional spending power; (2) RLUIPA does not violate the Establishment Clause; (3) RLUIPA does not usurp the regulation of a core state function in violation of the Tenth Amendment; (4) the Eleventh Amendment did not bar the suit; and (5) RLUIPA does not violate the doctrine of separation of powers.

Affirmed.

West Headnotes

[1] KeyCite this headnote

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to State and Local Agencies in General.

A statute properly passed under the Spending Clause must meet certain requirements: the statute must be in pursuit of the general welfare; any conditions on federal grants must be

unambiguous, clearly communicating to states the consequences of their participation in the federally funded scheme; conditional federal grants may be illegitimate if they are unrelated to the federal interest in particular national projects or programs; and other constitutional provisions may provide independent grounds for invalidating an otherwise proper exercise of Congress's Spending Clause authority. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[2] KeyCite this headnote

78 Civil Rights
78I Rights Protected and Discrimination Prohibited
78I(A) In General
78k102 Statutory Provisions
78k103 k. Power to Enact and Validity.

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to State and Local Agencies in General.

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) is a legitimate exercise of Congressional spending power, as protecting religious worship in institutions from substantial and illegitimate burdens promotes the general welfare, the Act unequivocally states that it applies to any "program or activity that receives Federal financial assistance," the fact that the least restrictive means standard is perhaps unpredictable does not weaken the express conditional language, and the conditions in RLUIPA share a relationship to the federal interest in particular national projects or programs. U.S.C.A. Const.Amend. 1; U.S.C.A. Const. Art. 1, § 8, cl. 1; Religious Land Use and Institutionalized Persons Act of 2000, § 3(b)(1), 42 U.S.C.A. § 2000cc-1(b)(1).

[3] KeyCite this headnote

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to State and Local Agencies in General.

Congress possesses great leeway to determine which statutory aims advance the general welfare, for purposes of properly legislating under the Spending Clause, and federal courts must defer substantially to Congress in determining if a statute advances the general welfare. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[4] KeyCite this headnote

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to State and Local Agencies in General.

In order to properly legislate under the Spending Clause, Congress is not required to list every factual instance in which a state will fail to comply with a condition, but Congress must make the existence of the condition itself, in exchange for the receipt of federal funds, explicitly obvious. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[5] KeyCite this headnote

78 Civil Rights
78I Rights Protected and Discrimination Prohibited
78I(A) In General
78k102 Statutory Provisions

78k103 k. Power to Enact and Validity.

92 Constitutional Law
92V Personal, Civil and Political Rights
92k84 Religious Liberty and Freedom of Conscience
92k84.5 Particular Matters and Applications
92k84.5(14) k. Prisons.

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), prescribing that "[n]o government shall impose a substantial burden on the religious exercise" of prisoners unless the government can demonstrate that the burden both serves a compelling government interest and is the least restrictive means of advancing that interest, does not violate the Establishment Clause; it intends a secular legislative purpose of protecting the exercise of religion in institutions from unwarranted and substantial infringement, it does not impose affirmative duties on states that would require them to facilitate or subsidize the exercise of religion, and it does not require "pervasive monitoring" to prevent the government from indoctrinating religion. U.S.C.A. Const.Amend. 1; Religious Land Use and Institutionalized Persons Act of 2000, §§ 2 et seq., 8(7)(A), 42 U.S.C.A. §§ 2000cc et seq., 2000cc-5(7)(A).

[6] KeyCite this headnote

92 Constitutional Law
92V Personal, Civil and Political Rights
92k84 Religious Liberty and Freedom of Conscience
92k84.1 k. In General.

A statute will survive an Establishment Clause attack if: (1) it has a secular legislative purpose, (2) its primary effect neither

advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

[7] KeyCite this headnote

92 Constitutional Law
92V Personal, Civil and Political Rights
92k84 Religious Liberty and Freedom of Conscience
92k84.1 k. In General.

The secular purpose requirement for a statute's validity under the Establishment Clause does not mean that the law's purpose must be unrelated to religion. U.S.C.A. Const.Amend. 1.

[8] KeyCite this headnote

78 Civil Rights
78I Rights Protected and Discrimination Prohibited
78I(A) In General
78k102 Statutory Provisions
78k103 k. Power to Enact and Validity.

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(2) k. Federal Laws Invading State Powers.

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) does not usurp the regulation of a core state function in violation of the Tenth Amendment. U.S.C.A.

Const.Amend. 10; Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

KeyCite this headnote
[9]

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 k. State Officers or Agencies, Actions Against.

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk272 k. Injunctive or Mandatory Relief; Declaratory Judgments.

Eleventh Amendment did not bar suit against California State prison officials under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA); suit against state officials for prospective injunctive relief fell squarely within the Ex Parte Young exception to sovereign immunity. U.S.C.A. Const.Amend. 11; Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

[10] KeyCite this headnote

78 Civil Rights
78I Rights Protected and Discrimination Prohibited
78I(A) In General

78k102 Statutory Provisions
78k103 k. Power to Enact and Validity.

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(A) Legislative Powers and Delegation Thereof
92k51 Encroachment on Judiciary
92k57 k. Interposition in Particular Proceedings.

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) does not violate the doctrine of separation of powers, though it likely is a response to Supreme court decision in Smith, which held that laws of general applicability that incidentally burden religious conduct do not offend the First Amendment, as RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court, but provides additional protection for religious worship, respecting that Smith set only a constitutional floor, not a ceiling, for the protection of personal liberty. U.S.C.A. Const.Amend. 1; Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

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Appeal from the United States District Court for the Eastern District of California; Lawrence K. Karlton, Senior Judge, Presiding. D.C. No. CV-96- 01582-LKK(JFM).

Before SCHROEDER, Chief Judge; D.W. NELSON and RAWLINSON, Circuit Judges.

OPINION

D.W. NELSON, Senior Circuit Judge.

** 1 California State prison officials ("California") bring a facial challenge to the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (2000) ("RLUIPA"), on various grounds. Their appeal arises from a series of preliminary injunctions, issued pursuant to RLUIPA, which allow Muslim prisoners to attend Friday afternoon religious services.

The district court upheld the statute as a constitutional exercise of Congress's Spending Clause authority. We affirm. [FN1]

FN1. We have jurisdiction pursuant to 28 U.S.C. §§ 1291, 1292(a)(1).

I. FACTUAL AND PROCEDURAL BACKGROUND

RLUIPA protects prisoners and other institutionalized people from government infringement on their practice of religion. Specifically, the statute prescribes that "[n]o government shall impose a substantial burden on the religious exercise" of prisoners unless the government can demonstrate that the burden both serves a compelling government interest and is the least restrictive means of advancing that interest. 42 U.S.C. § 2000cc- 1(a) (2000).

A class of Muslim inmates imprisoned at Solano in California originally filed suit in 1996 against various officials of the California State prison system. They alleged *1066 that prison rules penalizing attendance at Friday afternoon religious services, called Jumu'ah, violated the First Amendment. They added a RLUIPA claim following its enactment in 2000.

California moved to dismiss the RLUIPA claim, arguing that the statute exceeded Congressional authority under the Spending Clause, the Commerce Clause, and the Fourteenth Amendment. California also attacked the statute as violative of the Establishment Clause of the First Amendment, the Tenth and Eleventh Amendments, and the principle of separation of powers. The United States intervened to defend RLUIPA as constitutional.

In a series of separate but related rulings, the district court upheld the constitutionality of RLUIPA, denied California's motion to dismiss, and granted the prisoners various preliminary injunctions. These injunctions barred prison officials from punishing prisoners for attending Jumu'ah services and prohibited officials from withholding good time credits from inmates who participated in Jumu'ah while this case proceeds.

II. STANDARD OF REVIEW

We review the constitutionality of a statute de novo. Eunique v. Powell, 302 F.3d 971, 973 (9th Cir.2002).

III. The Spending Clause

[1][2]The Spending Clause allows Congress to further its policy objectives by conditioning the receipt of federal funds on compliance with federal mandates. See South Dakota v. Dole, 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). This power is not limitless, however. A statute properly passed under the Spending Clause must meet certain requirements. First, the statute must be in pursuit of the general welfare. Id. at 207, 107 S.Ct. 2793. Second, any conditions on federal grants must be unambiguous, clearly communicating to states the consequences of their participation in the federally funded scheme. Id. Third, the Supreme Court has suggested that conditional federal grants "might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." Id. (internal quotations and citation omitted) (emphasis added). Finally, other constitutional provisions may provide independent grounds for invalidating an otherwise proper exercise of Congress's Spending Clause authority. Id. at 208. RLUIPA meets all of these requirements, and the statute is a legitimate exercise of Congressional spending power.

A. Promoting the General Welfare

**2[3]Congress possesses great leeway to determine which statutory aims advance the general welfare. The Supreme Court has made it clear that "[w]hen money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress...." Helvering v. Davis, 301 U.S. 619, 645, 57 S.Ct. 904, 81 L.Ed. 1307 (1937). The Court, in the leading case on Spending Clause authority, reaffirmed that federal courts must "defer substantially" to Congress in determining if a statute advances the general welfare. Dole, 483 U.S. at 207, 107 S.Ct. 2793. In fact, the Court seems doubtful that failure to advance the general welfare could ever provide adequate grounds for invalidating a federal statute. Id. at 207 n. 2, 107 S.Ct. 2793.

In any event, protecting religious worship in institutions from substantial and illegitimate burdens does promote the general welfare. The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting religious worship from impermissible government *1067 intrusion. By ensuring that governments do not act to burden the exercise of religion in institutions, RLUIPA is clearly in line with this positive constitutional value. Moreover, by fostering non- discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms. See, e.g., Title VI, 42 U.S.C. § 2000d et seq. (2002); Title VII, 42 U.S.C. § 2000e et seq. (2002); Title IX, 20 U.S.C. § 1681 (2002). No sound reason exists to disturb Congress's finding that RLUIPA promotes the general welfare.

B. Unambiguous Condition

[4] RLUIPA unequivocally states that it applies to any "program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). A spending power statute, as unambiguous in its conditional language as RLUIPA, ensures that the statute's intention to impose a condition is expressed clearly. By its plain language, RLUIPA clearly communicates that any institution receiving federal funds must not substantially burden the exercise of religion absent a showing that the burden is the least restrictive means of serving a compelling government interest. The fact that the least restrictive means standard is perhaps unpredictable because it has resulted in different determinations in different courts does not weaken the express conditional language. In fact, the Supreme Court has held that conditions may be "largely indeterminate," so long as the statute "provid[es] clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with [the conditions]." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 24-25, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). Congress is not required to list every factual instance in which a state will fail to comply with a condition. Such specificity would prove too onerous, and perhaps, impossible. Congress must, however, make the existence of the condition itself--in exchange for the receipt of federal funds--explicitly obvious. RLUIPA unambiguously creates this condition.

C. Relatedness to the Federal Interest in National Projects or Programs

**3 The Supreme Court has suggested that federal grants conditioned on compliance with federal directives might be illegitimate if the conditions share no relationship to the federal interest in particular national projects or programs. Dole, 483

U.S. at 207, 107 S.Ct. 2793. This possible ground for invalidating a Spending Clause statute, which only suggests that the legislation might be illegitimate without demonstrating a nexus between the conditions and a specified national interest, is a far cry from imposing an exacting standard for relatedness. The nonconclusive language leaves open the possibility for attacking a spending power statute on this basis, but it does not mean that a statute is automatically illegitimate.

The Court has stated more recently that "[s]uch conditions must ... bear some relationship to the purpose of the federal spending." New York v. United States, 505 U.S. 144, 167, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (citation omitted). The conditions in RLUIPA do share such a relationship. Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion. The federal government also has a strong interest in monitoring the treatment of federal inmates housed in state prisons and in contributing to their rehabilitation. Congress may allocate federal funds freely, then, to protect the free exercise of religion and to promote rehabilitation. If the Supreme Court has in fact imposed a low-threshold relatedness test, RLUIPA satisfies it.

*1068 *D. Independent Constitutional Proscriptions*

The inquiry does not end with the conclusion that RLUIPA is a valid exercise of Congress's Spending Clause authority.

[FN2] Other constitutional provisions may provide independent bases for striking RLUIPA. Dole, 483 U.S. at 208, 107 S.Ct. 2793.

FN2. Having established that RLUIPA satisfies the first three elements of the Dole test, we hold that Congress had the authority under the spending power to pass this statute. Accordingly, we need not decide whether Congress also had the authority to pass RLUIPA under the Commerce Clause.

i. The Establishment Clause

[5] The Establishment Clause of the First Amendment prohibits any government from enacting a law that would respect the establishment of religion. While this clause forbids Congress from advancing religion, the Supreme Court has interpreted it to allow, and sometimes to require, the accommodation of religious practices: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987). Moreover, "in commanding neutrality the Religious Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994).

[6] The three-part test developed in Lemon v. Kurtzman helps determine whether an accommodation statute achieves this neutrality by avoiding "sponsorship, financial support, and active involvement of the sovereign in religious activity." 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). A statute will survive an Establishment Clause attack if (1) it has a secular legislative purpose, (2) its primary

effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion. Id. at 612-13, 91 S.Ct. 2105.

a. Secular Purpose

**4 [7] Just because RLUIPA addresses religion does not mean that its purpose is religious in nature. The secular purpose requirement does not "mean that the law's purpose must be unrelated to religion--that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (internal quotation and citation omitted). Nothing in RLUIPA indicates that wholly impermissible purposes, such as the advancement of religion, underlie RLUIPA. See Bowen v. Kendrick, 487 U.S. 589, 603, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). Moreover, the Supreme Court has upheld statutes that "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Corp. of Presiding Bishop, 483 U.S. at 335, 107 S.Ct. 2862. RLUIPA intends a secular legislative purpose: to protect the exercise of religion in institutions from unwarranted and substantial infringement.

b. Primary Effect

The primary effect of RLUIPA neither advances nor inhibits religion. It does not impose affirmative duties on states that *1069 would require them to facilitate or subsidize the exercise of religion. RLUIPA instead calls for exactly the opposite--forbidding states from imposing impermissible burdens on religious worship so that prisoners may practice their religion

free from unlawful interference. The statute does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non- religious prisoners. RLUIPA merely accommodates and protects the free exercise of religion, which the Constitution allows. See Corp. of Presiding Bishop, 483 U.S. at 338, 107 S.Ct. 2862.

c. Excessive Entanglement

Finally, RLUIPA does not foster excessive government entanglement with religion. The statute, on its face, does not require "pervasive monitoring" to prevent the government from indoctrinating religion. Agostini v. Felton, 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (citation omitted). RLUIPA does not call on the federal government to supervise prisons and institutions closely to make sure federal funds do not sponsor religious practices. Unlike conferring a tax exemption on a religious organization or awarding aid to a faith-based school, RLUIPA removes burdens on religious exercise rather than according benefits. Likewise, RLUIPA does not require prison officials to develop expertise on religious worship or to evaluate the merits of different religious practices or beliefs. The statute itself defines religious exercise, 42 U.S.C. § 2000cc-5(7)(A), and requires only that states avoid substantially burdening these practices without a compelling justification.

[11] Because RLUIPA has a secular legislative purpose, its primary effect is neither to advance nor inhibit religion, and it does not foster excessive government entanglement with religion, RLUIPA does not violate the Establishment Clause.

ii. The Tenth Amendment

**5 [8] RLUIPA does not usurp the regulation of a core state function in violation of the Tenth Amendment. True, the prosecution and punishment of crime remains a basic police power. See Kelly v. Robinson, 479 U.S. 36, 47, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). However, RLUIPA does not regulate the operation of prisons. Under the statute, prison officials remain free to run their prisons as they see fit. RLUIPA just prohibits prison officials from unduly burdening inmates' free exercise of religion in the process.

The Tenth Amendment "[does] not concomitantly limit the range of conditions legitimately placed on federal grants." Dole, 483 U.S. at 210, 107 S.Ct. 2793. While Congress may not have authority to commandeer the management of state prisons, it "does have power to fix the terms upon which its money allotments to states shall be disbursed." Id. (citation omitted). If states disagree with the requirements of RLUIPA, they remain free to forgo federal funding and opt out of its mandates. [FN3]

> FN3. Federal funding comprises less than one percent of California's annual prison operating budget.

iii. The Eleventh Amendment

[9] The Eleventh Amendment does not bar this suit against California State prison officials under RLUIPA. Citizens of a state may not sue their own state. Hans v. Louisiana, 134 U.S. 1, 10, 10 S.Ct. 504, 33 L.Ed. 842 (1890). This case, by contrast, involves a suit by citizens of California *1070 against officials of the State of California for prospective injunctive relief. Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). This

case falls squarely within the Ex Parte Young exception to sovereign immunity and does not violate the Eleventh Amendment.

iv. The Principle of Separation of Powers

[10] RLUIPA likely is a response to Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which held that laws of general applicability that incidentally burden religious conduct do not offend the First Amendment. RLUIPA raises this standard by requiring states to demonstrate that prison regulations substantially burdening the free exercise of religion are the least restrictive means of achieving a compelling government interest. RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court because the statute does not overturn the Court's constitutional interpretation in Smith. See Miller v. French, 530 U.S. 327, 341-43, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000). Rather, RLUIPA provides additional protection for religious worship, respecting that Smith set only a constitutional floor--not a ceiling--for the protection of personal liberty. Smith explicitly left heightened legislative protection for religious worship to the political branches. Smith, 494 U.S. at 890, 110 S.Ct. 1595.

IV. CONCLUSION

We hold that Congress did not exceed its Spending Clause power in enacting RLUIPA.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KARLUK M. MAYWEATHERS; DIETRICH J. PENNINGTON; JESUS JIHAD; TERRANCE MATHEWS; ASWAD JACKSON; ANSAR KEES, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CALVIN TERHUNE; A.C. NEWLAND; BARRY SMITH; BONNIE GARIBAY; N. FRY; M.E. VALDEZ; N. BENNETT; and F.X. CHAVEZ,

Defendants.

_____ /

No. CIV S-96-1582 LKK/GGH P

ORDER

Plaintiffs are a class of Muslim state prisoners housed at California State Prison, Solano seeking relief under, inter alia, the Religious Land Use and Institutionalized Persons Act of 2000, Pub.L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. §§ 2000cc et seq. ("RLUIPA"), for alleged violations of the right to the free exercise of their religion. This matter comes before the court on defendants' motion to dismiss plaintiffs'

RLUIPA claim on the grounds that the act violates the constitution. I decide the motion based on the papers and pleadings filed herein and after oral argument.

I.
THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . . is in furtherance of a compelling governmental interest[] and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). The Act applies to any "program or activity that receives Federal financial assistance" or when "the substantial burden affects, or removal of that burden would affect [] commerce . . . among the several states . . . ." 42 U.S.C. § 2000cc-1(b)(1) and (2).

II.
DISMISSAL STANDARDS UNDER FED. R. CIV. P. 12(b)(6)

On a motion to dismiss, the allegations of the complaint must be accepted as true. See Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. See Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts

properly alleged. See id.; see also Wheeldin v. Wheeler, 373 U.S. 647, 648 (1963) (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the . . . laws in ways that have not been alleged." Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983).

III.
ANALYSIS

Defendants argue that Congress exceeded its authority under the Spending Clause when it enacted RLUIPA. They also argue that RLUIPA violates the Establishment Clause of the First Amendment as well as the Tenth, Eleventh and Fourteenth Amendments to the United States Constitution and the Separation of Powers and Commerce Clauses. I address their arguments below.

A. THE SPENDING CLAUSE

Defendants aver that Congress exceeded its authority under the Spending Clause by enacting RLUIPA because the Act

is not in pursuit of the general welfare, its requirements are too vague, it is unrelated to a federal interest and it is coercive. I address their argument below.

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]" U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." South Dakota v. Dole, 483 U.S. 203, 206 (1987)(quoting Fullilove v. Klutznick, 884 F.2d 445, 447 (9th Cir. 1989))(internal quotation marks omitted). Although "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution[,]" United States v. Butler, 297 U.S. 1, 66 (1936), it does have its limits.

As I now explain, the High Court has held that under current doctrine, there are four limitations to congressional authority under the Spending Clause. First, the plain language of the clause itself requires that the exercise of the spending power be in pursuit of the "general welfare." Dole, 483 U.S. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640-641 (1937) and Butler, 297 U.S. at 65). Second, "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Dole, 483 U.S. at 207 (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981))(internal quotation marks omitted). Third, "federal grants might be illegitimate if they are unrelated to the federal interest in

particular national projects or programs." Dole, 483 U.S. at 207-208 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)(plurality opinion))(internal quotation marks omitted). Finally, other constitutional provisions may provide an independent bar to the conditional grant of federal funds. Dole, 482 U.S. at 208 (citations omitted).

i. General Welfare

Defendants' bald assertion that RLUIPA does not advance the general welfare is not well taken. In considering whether an expenditure is intended to serve general public purposes, courts defer substantially to the judgment of Congress. Dole, 483 U.S. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640, 645 (1937)). In fact, "the concept of welfare or the opposite is shaped by Congress . . . ." Helvering, 301 U.S. at 645. The level of deference accorded a congressional decision is such that the Court has recently questioned whether "general welfare" is a judicially enforceable restriction at all. See Dole, 483 U.S. at 207 fn. 2 (quoting Buckley v. Valeo, 424 U.S. 1, 90-91 (1976)(per curiam)).

It is clear from the Act that Congress was endeavoring to ensure religious liberty, a concern of constitutional dimension. The Congressional Record reveals that the religious freedom of the incarcerated were of special concern to RLUIPA's sponsors.

> It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.

146 Cong. Rec. S7775 (daily ed. July 27, 2000)(Joint Statement of Senator Hatch and Senator Kennedy). In light of the Congressional Record, the plain intent of RLUIPA, and the level of deference due a congressional determination of the general welfare, the court concludes that RLUIPA serves general public purposes.

ii. Notice

Defendants argue that RLUIPA does not provide sufficient notice concerning the obligations attendant to the receipt of federal funds. Specifically, they contend that § 3 of RLUIPA is invalid because it does not detail specific conduct which is prohibited but rather provides broad protection against state interference with the free exercise of religion.

"When Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640 (1999)(quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981))(internal quotation marks omitted). "In interpreting language in spending legislation, we thus insis[t] that Congress speak with a clear voice, recognizing that [t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it." Davis, 526 U.S. at 640 (quoting Pennhurst, 451 U.S. at 17)(internal quotation marks omitted).

Contrary to defendants' position, the court concludes that RLUIPA's prohibition is clear. The Act bars the recipient of federal funds from placing substantial burdens on an inmate's

free exercise of religion absent a compelling interest and the employment of the least restrictive means. Similar language has been held to provide sufficient notice to other recipients of federal funding. See Davis, 526 U.S. at 640-644 (Title IX of the Education Amendments Act of 1972 which prohibits discrimination on the basis of sex in education provided sufficient notice that the recipients of federal funding can be held liable for their deliberate indifference to sexual discrimination by third parties).

iii. Relatedness

Generally, where Congress attaches a condition to the receipt of federal finding, the condition "must (among other requirements) bear some relationship to the purpose of the federal spending." New York v. United States, 505 U.S. 144, 167 (1992)(citations omitted). The High Court has left open the question of whether the condition must be directly related to the main purpose of the funding. Dole, 482 U.S. at 209 n.3. In any event, defendants argue that RLUIPA fails the relatedness prong because there is no federal financial assistance for inmate religious programs to which the condition could relate.

The "relatedness" requirement does not apply where the federal government endeavors to ensure that its funds are not used to engage in conduct with which it disagrees. In Lau v. Nichols, the Court held that Congress acted within its Spending Clause powers by requiring schools receiving federal funds to comply with Title VI of the Civil Rights Act of 1964. 414 U.S. 583 (1974). The Lau Court observed that Congress had not exceeded the limits of the Spending Clause by requiring federal funds recipients to comply with Title VI because "'[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages,

entrenches, subsidizes, or results in racial discrimination.'" Id. at 789 (quoting 110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963)).

In essence, RLUIPA seeks to ensure that federal funds are in no way used to suppress religious freedom. See 42 U.S.C. § 2000cc-1(b)(1). This goal is analogous to conditioning the receipt of federal education assistance so as to ensure that federal funds are not used to subsidize racial discrimination. See Lau, 414 U.S. 583. Moreover, as I now explain, even if the Dole relatedness standard applied, RLUIPA's purpose is related to the purposes underlying the federal funding.

RLUIPA's provisions are directly related to the rehabilitation of federal inmates housed in state prisons. According to defendants, the California state prison system currently receives federal funding in exchange for housing federal prisoners and INS detainees who would otherwise be kept at federal institutions. Had those prisoner been housed in federal institutions, they would enjoy protection of their religious freedoms under the Religious Freedom and Restoration Act, see 42 U.S.C. § 2000bb-1 ("RFRA"). In enacting RFRA, Congress found that religion played a vital role in the rehabilitative process for some inmates. See, e.g., 139 Cong. Rec. S578 (daily ed. Oct. 27, 1993)(statement of Sen. Hatch)("[E]xposure to religion is the best hope we have for rehabilitation of a prisoner. Most prisoners, like it or not, will eventually be returning to our communities.") RLUIPA seeks to extend the protection of religious freedom embodied in RFRA to, inter alia, federal inmates housed at state institutions. In sum, as to those prisoners, the rehabilitative concerns underlying RFRA apply with equal force to the concerns underlying RLUIPA, and thus, are germane to the purpose of the federal funding. Moreover, as noted, to the extent that Congress has determined that

rehabilitation of prisoners limits the commission of crimes, a result which clearly affects the general welfare, the extension of the act to state prisoners is also well within the germaneness limitation of the Spending Clause.

iv. Independent Constitutional Bar

Finally, defendants argue that the RLUIPA is unconstitutionally coercive because it conditions the receipt of all federal funding upon compliance with RLUIPA and not just a percentage of the federal funds as was the case in Dole. I cannot agree.

Although the Dole Court noted that some prior decisions had "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'" it ultimately concluded that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." Dole, 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 589-590 (1937))(internal quotation marks omitted). The Steward Machine Court, itself, expressed doubt as to whether the concept of coercion "can ever be applied with fitness to the relations between state and nation." 301 U.S. at 590. Instead, the Court has, over time, "been guided by a robust common sense which assumes" that states employ their "freedom of the will" in choosing whether to accept or reject conditional grants of federal financial assistance. Id. Similarly, the Ninth Circuit has noted that the coercion test "has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party." Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989)(upholding threatened reduction of federal highway funds by 95 percent).

In the case at bar, Congress has not made compliance with RLUIPA § 3 mandatory; rather, a state "seeking to escape the statute's obligations could simply forgo federal funding." Board of Education v. Mergens, 496 U.S. 226, 241 (1990). Indeed, the Supreme Court has recognized that, even in cases where forgoing federal funding would in fact "be an unrealistic option," compliance with the mandates of a Spending Clause condition "is the price a federally funded [entity] must pay." Id.[3]

Defendants also contend that RLUIPA violates the Establishment Clause of the First Amendment, the Tenth and Eleventh Amendments, the separation of powers and the Commerce Clause. I now turn to these arguments.

B. THE ESTABLISHMENT CLAUSE

Defendants argue that the RLUIPA violates the Establishment Clause by promoting religion over irreligion. Defendants are mistaken.

The Establishment Clause of the First Amendment to the United States Constitution provides that, inter alia, "Congress shall make no law respecting an establishment of religion." There are "three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial

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3. Although not necessary to the court's determination that RLUIPA is not unduly coercive, plaintiffs have provided the court with an excerpt of the California Department of Correction's 2001-2002 budget which indicates that federal funding amounts to a paltry 1.9 million dollars out of the Department's annual budget of roughly 4.8 billion dollars. The court takes judicial notice of plaintiffs' submission. See Fed. R. Evid. 201.

support, and active involvement of the sovereign in religious activity." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (internal citation and quotation marks omitted).

Under the Lemon standard, a court may invalidate a statute only if it is motivated wholly by an impermissible purpose, see Lynch v. Donnelly, 465 U.S. 668, 680 (1984); Stone v. Graham, 449 U.S. 39, 41 (1980), if its primary effect is the advancement of religion, see Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985), or if it requires excessive entanglement between church and state. See Lemon, 403 U.S. at 613. As I explain below, RLUIPA is guilty of none of these vices.

Defendants cite to Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1993) in support of their argument that RLUIPA does not have a secular purpose. In Kiryas Joel, the Court struck down New York Education Law § 1709 which specifically created a separate school district for a religiously-oriented community. The Court held that the law violated the Establishment Clause because it delegated political control to a religious group. 512 U.S. at 698. Contrary to defendants' suggestion, however, the Court did not hold that government protection of religious freedom ran afoul of the Establishment Clause. In fact, each opinion in that case disavowed any notion that government action to mitigate the impact of burdens on religion violates the Establishment Clause. See 512 U.S. at 705-708 (Souter, Blackmun, Stevens, O'Connor, Ginsberg, JJ.); id. at 711-12 (Stevens, Blackmun, Ginsberg, JJ.); id. at 714-16 (O'Connor, J.); id. at 722-723 (Kennedy, J.); id. at 743-45 (Scalia, Rehnquist, Thomas, JJ., dissenting).

In Corporation of the Presiding Bishop v. Amos, the Court considered an Establishment Clause challenge to the exemption from Title VII of the Civil Rights Act of 1964, codified as 42

U.S.C. § 2000e-1, for the secular nonprofit activities of a religious organization. 483 U.S. 327 (1987). In affirming the exemption, the Court observed that "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Amos, 483 U.S. at 334 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970))(internal quotation marks omitted). The Court went on to note that "[u]nder the Lemon analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Amos, 483 U.S. at 335; see also Lynch v. Donnelly, 465 U.S. 668, 673 (1984)("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.")

Nor does RLUIPA improperly advance or inhibit religion. While it is true that RLUIPA protects religious freedom, this is not fatal. As the Supreme Court has explained, "[f]or a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." Amos, 483 U.S. at 337 (emphasis in original). Section 3 of RLUIPA does not itself promote or subsidize a religious belief or message. Rather, it frees religious groups and individuals to practice as they otherwise would in the absence of certain state-imposed regulations. "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose." Id. (emphasis in original). The Supreme Court

> has never indicated that statutes that give special consideration to religious groups are per se invalid. That would run contrary to the teaching of our cases

> that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

Amos, 483 U.S. 327, 338 (1987).

Finally, RLUIPA does not "foster an excessive entanglement with religion." Lemon, 403 U.S. at 613. To the contrary, the Act seeks to protect religious liberty from intrusion by the States. As the Amos Court explained, "[i]t cannot be seriously contended that [the statute] impermissibly entangles church and state; the statute effectuates a more complete separation of the two . . . ." 483 U.S. at 339.

C. THE TENTH AND ELEVENTH AMENDMENTS

Defendants next argue that RLUIPA violates the Tenth and Eleventh Amendments to the United States Constitutions.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Supreme Court has held that, notwithstanding the Eleventh Amendment, federal courts have jurisdiction to hear suits seeking prospective injunctive relief against state officials who violate federal law. See Ex parte Young, 209 U.S. 123 (1908). The Court has since explained that the Ex parte Young

exception to state sovereign immunity is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984). In this case, plaintiffs seek only such injunctive relief.[4]

Nor does it appear that the Act violates the Tenth Amendment which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Supreme Court has explained that "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." New York v. United States, 505 U.S. 144, 156 (1992); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States."); see also United States v. Jones, 231 F.3d 508, 515 (9th Cir. 2000)("[I]f Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment."). As explained above, § 3 of RLUIPA is a valid enactment pursuant to Congress' Spending and Commerce Clause powers and therefore does not violate the Tenth Amendment.

D. THE COMMERCE CLAUSE

Finally, defendants argue that Congress exceeded it authority under the Commerce Clause when it enacted the RLUIPA. Again, I cannot agree.

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4. Because the instant suit seeks only prospective injunctive relief, the court need not consider whether a suit for damages lies under RLUIPA and, if so, what consequences flow from such a conclusion.

In addition to anchoring § 3(a) of RLUIPA in the Spending Clause, Congress alternately provided that § 3(a) applies in those instances when "the substantial burden affects or removal of that burden would affect, commerce with foreign nation, among the several States, or with Indian tribes." The jurisdictional element in § 3(b)(2) thereby ensures that Congress' Commerce Clause power is only exercised in those cases where interstate commerce is directly affected by the prison regulation at issue. See United States v. Lopez, 514 U.S. 549, 561 (1995)("Section 922(q) has no jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce.") Thus, by definition, § 3 of RLUIPA does not exceed the boundaries of the Commerce Clause.

E. SEPARATION OF POWERS

Next, defendants contend that § 3 of the RLUIPA seeks to reverse the Supreme Court's interpretation of the First Amendment's Free Exercise Clause as announced in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Defendants also complain that § 4(b) of the RLUIPA seeks to reverse the Supreme Court's analysis of prisoners' constitutional claims against state officials as outlined in Turner v. Safely, 482 U.S. 78 (1987).

While Congress cannot, through ordinary legislation, amend the Court's authoritative interpretation of the Constitution, "congressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place." United States v. Marengo County Comm'n, 731 F.2d 1546, 1562 (11th Cir. 1984); see also City of Boerne v. Flores, 521 U.S. 507, 535 (1997)("When Congress acts within its sphere of power and

responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic.") As explained above, Congress acted properly pursuant to its power under the Spending Clause and the Commerce Clause in enacting RLUIPA.

F. SECTION 5 OF THE FOURTEENTH AMENDMENT

Finally, defendants argue that Congress did not satisfy the requirements of section 5 of the Fourteenth Amendment to the United States Constitution when it enacted the RLUIPA. Plaintiffs concede as much but argue that the Act is nonetheless proper under the Commerce and Spending Clauses. There is no indication in the Act that Congress relied on the Fourteenth Amendment and any such defect would not impact the constitutionality of the Act insofar as it rests on independent constitutional authority.

IV.
ORDERS

Accordingly, the court hereby ORDERS that defendants' motion to dismiss plaintiffs' RLUIPA claim is DENIED.

Dated: June 29, 2001.

/s/ LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
July 2, 2001

* * CERTIFICATE OF SERVICE * *

2:96-cv-01582

Mayweathers

v.

Sutton

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 2, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KARLUK M. MAYWEATHERS; DIETRICH J. PENNINGTON; JESUS JIHAD; TERRANCE MATHEWS; ASWAD JACKSON; ANSAR KEES, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CALVIN TERHUNE; A.C. NEWLAND; BARRY SMITH; BONNIE GARIBAY; N. FRY; M.E. VALDEZ; N. BENNETT; and F.X. CHAVEZ,

Defendants.

_____ /

No. CIV S-96-1582 LKK/GGH P

ORDER

Plaintiffs are a class of Muslim state prisoners housed at California State Prison-Solano seeking relief under 42 U.S.C. § 1983 for alleged violations of their First Amendment right to the free exercise of their religion, as well as their Fourteenth Amendment right to Equal Protection of the law. This matter comes before the court on their motions for a preliminary

injunction and for substitution of class representatives. I decide these motions based on the papers and pleadings filed herein and after oral argument.

I.
SUBSTITUTION OF CLASS REPRESENTATIVES

Plaintiffs request leave to substitute class member Jamal Garner as plaintiff class representative in the place of class representatives Dietrich J. Pennington, Jesus Jihad and Aswad Jackson. I grant plaintiffs' motion based on the analysis below.

"It is firmly established that where a class action exists, members of the class may intervene or be substituted as named plaintiff in order to keep the action alive after the claims of the original named plaintiffs are rendered moot." Graves v. Walton County Board of Educ., 686 F.2d 1135, 1138 (5th Cir. 1982) (citations omitted); Kuahulu v. Employers Ins. of Wasusua, 557 F.2d 1334, 1336 (9th Cir. 1977)(same); see also Walters v. Edgar, 163 F.3d 430, 432 (7th Cir. 1999).

The court previously defined the plaintiff class as encompassing "all present and future Muslim inmates incarcerated at CSP-Solano." Order dated November 19, 1998 at 2:6-7. The defendants transferred inmates Dietrich J. Pennington, Jesus Jihad and Aswad Jackson away from CSP-Solano and therefore these individuals' claim are now moot.[1]

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1. That is not to say that these plaintiffs cannot continue to represent the class so long as the court found them to continue to be adequate representatives. See Kuahulu, 557 F.2d at 1336 ("It is true that one may still represent a class if one's individual claim is moot provided that one's representation would be adequate.") Nonetheless, their claims are now moot

Plaintiff Jamal Garner is an appropriate representative plaintiff because, as a Muslim inmate at CSP-Solano, he is class member. Specifically, Garner is subject to punishment if he grows a beard for religious purposes, and is subject to punishment in the form of receipt of disciplinary "A" days and loss of work time credits if he leaves his work assignment to attend Jumu'ah. Moreover, Garner may lose the opportunity to earn good-time credits for attending Jumu'ah under defendant Newland's August 28, 2000 memorandum which provides that inmates assigned to certain workstations would not be allowed to return to work after attending Jumu'ah.

II.
MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move for a preliminary injunction identical to that which the court has previously ordered. They also move for a new preliminary injunction barring defendants from denying Jumu'ah observers the opportunity to earn good-time credits. I address these motions separately because, as I explain below, they implicate different standards.

A. IDENTICAL PRELIMINARY INJUNCTIVE RELIEF

With respect to plaintiff's first preliminary injunction, they argue that the court may summarily reenter a preliminary injunction based upon the principles of law of the case.[2]

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and therefore, plaintiffs' request to substitute them out is proper. See id.

2. For a second time, plaintiffs request this court to make a "final determination" that the preliminary injunctive relief is "narrowly drawn, extends no further than necessary to correct

The law of the case doctrine requires that when a court decides on a rule, it should ordinarily follow that rule during the pendency of the matter. See Arizona v. California, 460 U.S. 605 (1983). It is, of course, merely a prudential doctrine; nonetheless, the doctrine guides the court's discretion on issues such as the one at bar. See Slotkin v. Citizens Cas. Co., 614 F.2d 301, 312 (2d Cir. 1979)(the law of the case "does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided.") "The rule of practice promotes finality and efficiency of the judicial process by protecting against the agitation of settled issues . . . ." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)(citations and internal quotation marks omitted). Grounds justifying departure from the law of the case include substantially different evidence, a change in controlling authority or the need to correct a clearly erroneous

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the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1). Plaintiffs maintain that by making such a final finding, the injunction will not expire in ninety days. See 18 U.S.C. § 3626(a)(2)("Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.") Although the plaintiffs are correct that the injunction would not expire by operation of law if this court makes its findings final, they have not suggested how the court can make a final determination that injunctive relief extends no further than necessary to correct the violation of the federal right without first determining that a federal right has indeed been violated. This determination, in turn, can be made only after a trial or motion for summary judgment.

decision which would work a manifest injustice. See White v. Murtha, 377 F.2d 428, 431-432 (5th Cir. 1967).

The addition of the RLUIPA claim, 42 U.S.C. §§ 2000cc, et seq., does not affect the propriety of reliance on the law of the case doctrine. Under RLUIPA, the government is forbidden from imposing a "substantial burden on the religious exercise" of inmates "unless the government demonstrates that the imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). This standard is much more difficult for defendants to meet than the standard which previously governed this case. See Turner v. Safely, 482 U.S. 78, 89 (1987)("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonable related to legitimate penalogical interests.")[3] Therefore, it significantly increases plaintiffs' likelihood of success on the merits and greatly increases their entitlement of preliminary injunctive relief.

The defendants have failed to present any new arguments explaining why this court should deny plaintiffs' motion. Rather, defendants again argue that this court lacks jurisdiction to issue a new preliminary injunction, that the Prison Reform Litigation Act forbids the issuance of a successive preliminary injunction,

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3. The Turner Court outlined four factors bearing on the reasonableness determination: whether there is a rational connection behind the regulation and the asserted reason behind it; whether there are alternative means for the prisoner to exercise that right; whether exercise of the right will have an adverse impact on guards, other inmates and the allocation of prison resources; and whether ready alternative are open to prison officials. Id. at 89-90.

that the court's preliminary injunction violates the Establishment Clause of the First Amendment, that plaintiffs are not entitled to preliminary injunctive relief and that plaintiffs failed to exhaust their administrative remedies under RLUIPA.[4] This court has previously rejected all of these arguments and will not address them again here. See Order filed December 19, 2000 at 5-12. Therefore, the court preliminarily enjoins defendants from disciplining or forcing plaintiffs to forfeit good-time credits for attending Jumu'ah services during the pendency of this action.

B. NEW PRELIMINARY INJUNCTIVE RELIEF

Plaintiffs also move the court to preliminarily enjoin defendants from denying plaintiffs the opportunity to earn good-time credits because of their observation of Jumu'ah. I address their motion below.

i. Standard for Preliminary Injunctive Relief

The purpose of the preliminary injunction as provided by Fed. R. Civ. P. 65 is to preserve the relative positions of the parties -- the status quo -- until a full trial on the merits can be

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4. Defendants insist that this court cannot issue preliminary injunctions to maintain the status quo pending appeal and yet they persist in appealing each of this court's preliminary injunctions. It is unclear how they can both prevent the final disposition of this case while, at the same time, argue that the court is without power until a final judgment is rendered. It suggests that the court's approach in issuing successive injunctions is correct. Otherwise, a state defendant could leave a plaintiff inmate without interim relief or a final decision and thereby frustrate the plain language of 42 U.S.C. § 1983. See Mayweathers v. Terhune, 136 F.Supp.2d 1152 (E.D. Cal. 2001).

conducted. See University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). The limited record usually available on such motions renders a final decision on the merits inappropriate. See Brown v. Chote, 411 U.S. 452, 456 (1973).

"The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). In the Ninth Circuit, two interrelated tests exist for determining the propriety of the issuance of a preliminary injunction. The moving party carries the burden of proof on each element of either test. See Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1203 (9th Cir. 1980). Under the first "traditional" test, the court may not issue a preliminary injunction unless each of the following requirements is satisfied: (1) the moving party has demonstrated a likelihood of success on the merits, (2) the moving party will suffer irreparable injury and has no adequate remedy at law if injunctive relief is not granted, (3) in balancing the equities, the non-moving party will not be harmed more than the moving party is helped by the injunction, and (4) granting the injunction is in the public interest. See Martin v. International Olympic Committee, 740 F.2d 670, 674-75 (9th Cir. 1984).

Under the second "alternative" test, the court may not issue a preliminary injunction unless the moving party demonstrates either "probable success on the merits and irreparable injury . . . or . . . sufficiently serious questions going to the merits to make the case a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party requesting relief." Topanga Press Inc. v. City of Los Angeles, 989 F.2d 1524, 1528 (9th Cir. 1993)(citations omitted). The Ninth Circuit has explained that the two parts of the alternative test are

not separate and unrelated, but are "extremes of a single continuum." Benda v. Grand Lodge of International Association of Machinists, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979). We are taught that the critical element within this alternative test is the relative hardship to the parties. See id. "[T]he required degree of irreparable harm increases as the probability of success decreases." United States v. Nutri-cology Inc., 983 F.2d 394, 397 (9th Cir. 1992)(citations and internal quotation marks omitted). Even if the balance tips sharply in favor of the moving party, however, "it must be shown as an irreducible minimum that there is a fair chance of success on the merits." International Olympic Committee, 740 F.2d at 674-75. (citation omitted).

ii. Application

Defendants assert that the representative plaintiff lacks standing to challenge the denial of the opportunity to earn good time credits. I cannot agree.

"The Article III case or controversy requirement restricts federal jurisdiction to those cases where the plaintiffs can maintain that their injury or the threat of future injury by the defendants is both real and immediate, not conjectural or hypothetical." Thomas v. City of Los Angeles, 978 F.2d 504, 507 (9th Cir. 1993)(citations and internal quotation marks omitted). Moreover, "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing, he or she must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980).

Plaintiff Jamal Garner has standing to challenge the defendants' prison regulation. First, he is eligible to earn good time credits and, second, his job assignment conflicts with Jumu'ah. Therefore, the threat to his right to exercise his religion is both real and imminent. See Thomas v. City of Los Angeles, 978 F.2d at 507. I now turn to the merits of plaintiffs' motion.

a. Likelihood of Success on the Merits/Irreparable Harm

As noted above, defendant Newland's memorandum of August 28, 2000, see Pls.' Motion for Contempt exh. A, ordered that inmates assigned to certain workstations not be allowed to return to work after attending Jumu'ah. By considering Jumu'ah services an unexcused absence and by limiting the ability of those attending Jumu'ah services to return to work, the defendant's actions have the effect of forcing plaintiffs to forego good-time credits in exchange for observing their faith.[5]

In light of this memo and the importance of Jumu'ah to followers of Islam, the court concludes that the defendants' actions amount to a substantial burden on the plaintiffs' free religious exercise. See 42 U.S.C. § 2000cc-1(a). Moreover, the defendants have not demonstrated that this imposition is in furtherance of a compelling governmental interest or that it is the least restrictive means of furthering any such compelling governmental interest. Id. Therefore, plaintiffs have

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5. Inmates who are eligible to earn Penal Code § 2933 worktime credits "shall be awarded . . . one day of credit for each day of qualifying performance[,]" 15 Cal. Code Reg. § 3044(b)(1), which is defined as a workday of, "not . . . less than six hours . . . ." Id.

demonstrated a likelihood of success on the merits. Moreover, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347 (1976); accord Jacobsen v. United States Postal Service, 812 F.2d 1151, 1154 (9th Cir. 1987)(violation of First Amendment Rights "is, each day, an irreparable injury.")

b. Balance of the Equities

Defendants contend that transporting inmates from Jumu'ah services to their work assignment amounts to a serious hardship for defendants. They argue that given the approximately 4620 inmates in the work incentive program, ensuring that Muslim inmates have the opportunity to earn good-time credits requires the deployment of staff to process and move inmates.

This court's injunction, however, does not require defendants to transport inmates from Jumu'ah to their work site. In prior litigation between an inmate at the California Medical Facility and Cal Terhune, the Director of the California Department of Corrections, and the current warden of the CMF, Ana Olivarez-Palmara, this court determined that defendants' denial of plaintiff's request to use ETO (Excused Time Off), see Cal. Code Regs. tit. 15, § 3045.2(e),[6] to

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6. Section 3045.2 provides in pertinent part:

(e) Authorized uses of ETO. Excused time off may be approved by work/training supervisors only for the below stated reasons. A proposal to use ETO for any other reason requires approval by the director.

(1) Family visiting. An inmate scheduled for a

family visit may be permitted to visit in the visiting room (regular visit) on the first day of a family visit while awaiting processing, and on the last day of the family visit.

(2) Regular visiting under extraordinary circumstances. Following are extraordinary circumstances for which use of ETO is authorized:

(A) Out-of-state visitors. Upon substantiation that the visitor(s) resides out-of-state and is in California for a temporary stay of 30 days or less, and the visitor(s) has not visited with the particular inmate for four months. No more than two such visits shall be permitted for each such occurrence.

(B) Excessive distance. When a visitor must travel a distance of 250 miles or more, and has not visited the inmate within the last 30 days.

(C) Weddings. When an inmate marries, the inmate may, with five working days prior approval, use ETO for a visit on the wedding day.

(D) Handicapped. When a visitor is handicapped as defined by California law and must rely on special transportation to the institution. Approval is required five working days prior to the visit.

(E) Family emergencies. When death, serious illness or injury occurs to an inmate's immediate family member,

attend Jumu'ah violated the First Amendment. See Fenelon v. Riddle et al., No. CIV S-95-954, slip op. (E.D. Cal. May 1, 2000). The court's decision in Fenelon binds the defendant Cal Terhune in the current action, see Peck v. Commissioner, 904 F.2d 525, 527 (9th Cir. 1990)(issue actually litigated and

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clergymen, family members or close friends may visit the inmate to offer condolences or inform the inmate of the occurrence.

(F) Infrequent visits. When an inmate normally receives infrequent visits and a visitor unexpectedly arrives. Infrequent means not more than one visit each six months.

(G) Visiting during authorized absence. An inmate shall be permitted to visit using ETO during approved periods away from assignment involving circumstances beyond the inmate's control. (Refer to section 3045.1(a). of these regulations.)

(3) Temporary community leave.

(4) Special religious functions, other than routine services.

(5) Non-routine recreation and entertainment activities.

(6) Emergency telephone access.

Cal. Code Regs. tit. 15, § 3045.2(e).

necessarily determined is conclusive on subsequent suits based on different causes of action involving party or privy to prior litigation), but does not necessarily bind the other defendants who were not parties to the prior action. However defendants choice to follow the court's injunction is within their discretion. Defendants may not, however, opt for the more onerous method of compliance and, at the same time, argue that its burdens are inequitable.[7]

IV.
ORDERS

Accordingly, the court hereby makes the following ORDERS:

1. Plaintiffs' motion to substitute Jamal Garner as plaintiff class representative in the place of Dietrich J. Pennington, Jesus Jihad and Aswad Jackson is GRANTED; and

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7. This is not the same as placing the burden on defendants to prove that no reasonable methods exist by which prisoners' religious rights can be accommodated, an approach disavowed by the Supreme Court. See O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). In O'Lone, the Court held that such an approach ran afoul of the standards announced in Turner, 482 U.S. 78. This case differs in two respects. First, RLUIPA and not Turner governs defendants' restriction on plaintiffs' free exercise of religion and second, the balance of equities consideration is relevant to the propriety of the issuance of a preliminary injunction and not to the plaintiffs' chance of success on the merits. See Martin v. International Olympic Committee, 740 F.2d 670.

2. Plaintiffs' motion for a preliminary injunction is GRANTED to wit plaintiffs are allowed to attend Jumu'ah services during the pendency of this action without receiving disciplinary action, forfeiting good-time credits, or losing the opportunity to earn good-time credits.

Dated: June 29, 2001.

/s/ LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
July 5, 2001

* * CERTIFICATE OF SERVICE * *

2:96-cv-01582

Mayweathers

v.

Sutton

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 5, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KARLUK M. MAYWEATHERS; DIETRICH J. PENNINGTON; JESUS JIHAD; TERRANCE MATHEWS; ASWAD JACKSON; ANSAR KEES, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CALVIN TERHUNE; A.C. NEWLAND; BARRY SMITH; BONNIE GARIBAY; N. FRY; M.E. VALDEZ; N. BENNETT; and F.X. CHAVEZ,

Defendants.

_____ /

No. CIV S-96-1582 LKK/GGH P

ORDER

Plaintiffs are a class of Muslim state prisoners housed at California State Prison-Solano seeking relief under 42 U.S.C. § 1983 for alleged violations of their First Amendment right to the free exercise of their religion, as well as their Fourteenth Amendment right to Equal Protection of the law. This matter comes before the court on their motion for a fifth preliminary

injunction. The standards for such a motion are well-known and need not be repeated here. See Topanga Press Inc. v. City of Los Angeles, 989 F.2d 1524, 1528 (9th Cir. 1993).

Plaintiffs move for a preliminary injunction identical to that which the court has previously ordered. They argue that the court may summarily reenter a preliminary injunction based upon the principles of the law of the case.

The law of the case doctrine requires that when a court decides on a rule, it should ordinarily follow that rule during the pendency of the case. See Arizona v. California, 460 U.S. 605 (1983). It is, of course, merely a prudential doctrine; nonetheless, the doctrine guides the court's discretion on issues such as the one at bar. See Slotkin v. Citizens Cas. Co., 614 F.2d 301, 312 (1979) (The law of the case "does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided.") "The rule of practice promotes finality and efficiency of the judicial process by 'protecting against the agitation of settled issues . . . .'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988).

Grounds justifying departure from the law of the case include substantially different evidence, a change in controlling authority or the need to correct a clearly erroneous decision which would work a manifest injustice. See White v. Murtha, 377 F.2d 428, 431-432 (5th Cir. 1967).

Defendants' contentions were previously argued and rejected when the court issued the first and second preliminary injunction and in the court's order denying defendants' motion to dismiss plaintiffs' RLUIPA claim. The court affirms its prior rejection of these contentions because the defendants have failed

to identify substantially different evidence, a change in the controlling legal authority, or any error in the court's prior decision. See id.

Defendants also advance one new argument. Defendants submit that the Eleventh Amendment precludes this court from interpreting state regulations to allow inmates to use excused time off (ETO) for attendance at Jumu'ah services. See Pennhurst State School & Hospital v. Halderman, 464 U.S. 89 (1984). Defendants' argument is misplaced.

In Pennhurst, the Supreme Court held that under the Eleventh Amendment, federal courts may not order state officials to conform their conduct to state law. Id. at 106. However, it is quite clear that the Eleventh Amendment is no bar to prospective relief insofar as that relief is predicated on constitutional or federal statutory claims. Id. at 104-107. This court has recently held in another matter that the denial of plaintiffs' request to use ETO to attend Jumu'ah violated the First Amendment. See Court's Mayweathers Order, dated July 5, 2001, at 11:8-12:2 (citing Fenelon v. Riddle et al., No. CIV S-95-954, slip op. (E.D. Cal. May 1, 2000)). In this mater, the court has concluded that plaintiffs' RLUIPA claim "increases plaintiffs' likelihood for success on the merits." See id, at 5:16-18. In sum, plaintiffs' request for injunctive relief is predicated on federal constitutional law. Accordingly, Pennhurst is inapplicable.

For the foregoing reasons, plaintiffs' motion for a fifth preliminary injunction is GRANTED.

Dated: September 21, 2001.

/s/ LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
September 24, 2001

* * CERTIFICATE OF SERVICE * *

2:96-cv-01582

Mayweathers

v.

Sutton

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 24, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KARLUK M. MAYWEATHERS; DIETRICH J. PENNINGTON; JESUS JIHAD; TERRANCE MATHEWS; ASWAD JACKSON; ANSAR KEES,	No. 01-16505 D.C. No. CV-96-01582 LKK(JFM)
Plaintiffs-Appellees,	O R D E R
and	
UNITED STATES OF AMERICA,	
Intervenor,	
v.	
ANTHONY C. NEWLAND, individually and in official capacity; BARRY SMITH, individually and in his official capacity; CAL A. TERHUNE; N. BENNETT; M.E. VALDEZ,	
Defendants-Appellants.	

KARLUK M. MAYWEATHERS; DIETRICH J. PENNINGTON; JESUS JIHAD; TERRANCE MATHEWS; ASWAD JACKSON; ANSAR KEES,
Plaintiffs-Appellees,

v.

ANTHONY C. NEWLAND individually and in official capacity; BARRY SMITH, individually and in his official capacity; CAL A. TERHUNE; N. BENNETT; M. E. VALDEZ,
Defendants-Appellants.

No. 01-16607

D.C. No. CV-96-01582 LKK(JFM)

KARLUK M. MAYWEATHERS; DIETRICH J. PENNINGTON; JESUS JIHAD; TERRANCE MATHEWS; ASWAD JACKSON; ANSAR KEES,
Plaintiffs-Appellees,

v.

CAL A. TERHUNE; A.C. NEWLAND; BARRY SMITH; BONNIE GARIBAY; N. FRY; M. E. VALDEZ; N. BENNETT; F. X. CHAVEZ,
Defendants-Appellants.

No. 01-17133

D.C. No. CV-96-01582 LKK(JFM)

Before: SCHROEDER, Chief Judge; D.W. NELSON and RAWLINSON, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Schroeder and Rawlinson voted to deny the petition for rehearing en banc. Judge Nelson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R.App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are denied.

Supreme Court, U.S.
FILED
AUG 13 2003
OFFICE OF THE CLERK

(2)

No. 02-1655

In the Supreme Court of the United States

EDWARD S. ALAMEIDA, JR., DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS

v.

KARLUK M. MAYWEATHERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the institutionalized persons provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-1, violate separation-of-powers principles.

2. Whether the institutionalized persons provisions of RLUIPA are a valid exercise of Congress's Spending Clause or Commerce Clause powers.

3. Whether the institutionalized persons provisions of RLUIPA are valid under the Establishment Clause of the First Amendment.

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In the Supreme Court of the United States

No. 02-1655

EDWARD S. ALAMEIDA, JR., DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS

v.

KARLUK M. MAYWEATHERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 314 F.3d 1062. The opinion (Pet. App. 20-37) and orders (Pet. App. 38-53, 54-59) of the district court are not reported.

JURISDICTION

The court of appeals entered its judgment on December 27, 2002. A petition for rehearing was denied on February 6, 2003 (Pet. App. 60-62). The petition for a writ of certiorari was filed on May 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, is a civil rights law designed to provide, as a matter of statutory right, heightened protection for the free exercise of religion and to prevent religious discrimination. At the time of RLUIPA's enactment, evidence before Congress demonstrated that, in the absence of federal legislation, prisoners, detainees, and individuals institutionalized in mental hospitals faced substantial and unwarranted burdens in freely practicing their religious faiths. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 9-10 (1999) (summarizing testimony). Based on the evidence it compiled, Congress concluded that the rights of institutionalized persons to practice their faith often were burdened by "frivolous or arbitrary rules," and that, whether for reasons of "indifference, ignorance, bigotry, or lack of resources," some institutions restrict religious liberty in "egregious and unnecessary ways." 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA).

Congress responded by enacting Section 3 of RLUIPA to provide institutionalized persons protection from unnecessary burdens on religious practice. 42 U.S.C. 2000cc-1.[1] Section 3(a) provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least

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[1] Section 2 of the statute, 42 U.S.C. 2000cc, protects persons and entities against land use regulations that burden religious exercise or discriminate on the basis of religion. That provision is not at issue in this suit.

restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a).[2] RLUIPA defines the "government" to which it applies as "a State, county, municipality, or other governmental entity created under the authority of a State," and "any branch, department, agency, instrumentality, or official of [such] an entity." 42 U.S.C. 2000cc-5(4).[3]

Invoking its power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, Congress required compliance with Section 3(a) whenever "the substantial burden [on religion] is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1). Congress also exercised its Commerce Clause power, U.S. Const. Art. I, § 8, Cl. 3, as an independent constitutional basis for Section 3 in those cases where "the substantial burden affects, or removal of that substantial burden would affect, commerce with

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[2] 42 U.S.C. 2000cc-1(a) provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> > (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

[3] Through the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, Congress has imposed a much broader obligation on the federal government to justify substantial burdens on religion imposed by any federal governmental activity —not just zoning or institutionalization. The courts of appeals have uniformly rejected the argument that RFRA's application to the federal government violates separation-of-powers principles or the Establishment Clause. See cases cited at note 8, *infra*.

foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2). However, even if a plaintiff demonstrates the requisite effect on commerce, RLUIPA's provisions do not apply if the defendant demonstrates, as an affirmative defense, that the statute is inapplicable because the type of burden at issue, in the aggregate, would not have a substantial effect on commerce. 42 U.S.C. 2000cc-2(g).[4]

RLUIPA creates a private right of action, which allows any individual whose exercise of religion has been substantially burdened to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). The United States also may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Respondents, a class of Muslim inmates at the California State Prison at Solano, brought suit against petitioners alleging, *inter alia*, that certain prison procedures and regulations burdened their free exercise of religion, in violation of the First Amendment and RLUIPA. Pet. App. 10. Petitioners moved to dismiss the RLUIPA claim on the grounds that the statute ex-

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[4] 42 U.S.C. 2000cc-2(g) provides:

> If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

ceeds Congress's powers under the Spending Clause, the Commerce Clause, and Section 5 of the Fourteenth Amendment, and that the statute violates the Establishment Clause, the separation-of-powers doctrine, the Tenth Amendment, and the Eleventh Amendment. *Ibid.* The United States intervened to defend the constitutionality of RLUIPA pursuant to 28 U.S.C. 2403(a). Pet. App. 10.

The district court denied the motion to dismiss, rejecting all of petitioners' constitutional challenges. Pet. App. 20-35. In a separate order, the court granted respondents a preliminary injunction prohibiting the petitioners from disciplining respondents or forcing respondents to forfeit good-time credits for attending Friday afternoon religious services (known as Jumu'ah) while the case is pending. *Id.* at 38-51. The court based its ruling on earlier orders that already had granted respondents the identical preliminary injunctive relief prior to the enactment of RLUIPA. *Id.* at 54-57. The court treated the earlier orders as law of the case, and determined that the enactment of RLUIPA simply reinforced its earlier conclusions concerning the respondents' likelihood of success on the merits and entitlement to preliminary injunctive relief. *Id.* at 42. The court also preliminarily enjoined petitioners from denying respondents the opportunity to earn good-time credits because of their observation of Jumu'ah. *Id.* at 43-51. The court determined that respondents had established a likelihood of success on the merits of that claim under RLUIPA and a risk of irreparable harm, and that the balance of equities tipped in their favor. *Id.* at 46-47.

3. The court of appeals affirmed. Pet. App. 1-19. The court held that, under this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), RLUIPA "is

a legitimate exercise of Congressional spending power," Pet. App. 11, because it "promote[s] the general welfare" by "protecting religious worship in institutions from substantial and illegitimate burdens," *id.* at 12, and because "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties," *id.* at 14. Having determined that RLUIPA is a valid exercise of Congress's spending power, the court declined to address whether RLUIPA is also a valid exercise of Congress's Commerce Clause authority. *Id.* at 15 n.2.

The court of appeals further determined that RLUIPA is a permissible accommodation of religious practices under the Establishment Clause. Pet. App. 15-17. The court found that the primary aim and effect of RLUIPA's institutionalized persons provisions is to protect against substantial, state-imposed burdens on the religious exercise of institutionalized persons, and that the removal of such government-imposed burdens does not foster an excessive entanglement with religion. *Id.* at 17. The court concluded that "RLUIPA merely accommodates and protects the free exercise of religion, which the Constitution allows." *Ibid.*

Finally, the court of appeals rejected petitioners' claim that RLUIPA's institutionalized persons provisions violate separation-of-powers principles. Pet. App. 19. The court explained that RLUIPA does not purport to revise this Court's interpretation of the Constitution, but rather, like many other laws, simply "provides additional [statutory] protection for religious worship." *Ibid.*[5]

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[5] The court of appeals also rejected petitioners' Tenth and Eleventh Amendment challenges. Pet. App. 18-19. Petitioners do not renew those claims before this Court.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition, moreover, seeks interlocutory review of a preliminary injunction that, itself, is largely predicated on alternative legal grounds that are not presented in the petition. Accordingly, this Court's review is not warranted.

1. Petitioners seek review (Pet. 6-14) of the court of appeals' decision sustaining the constitutionality of RLUIPA's institutionalized person provisions. That decision, however, does not conflict with the ruling of any other court of appeals. To the contrary, the court's ruling here represents the first appellate court decision on the question. The question is currently pending before the Fourth, Sixth, and Seventh Circuits.[6] Appellate consideration of and deliberation on the constitutional questions raised by the petition is thus in its nascency, making review by this Court at this stage unnecessary. Because RLUIPA is a relatively new law,

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[6] See *Madison* v. *Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), interlocutory appeal pending, No. 03-6362 (4th Cir. filed Mar. 4, 2003) (pending briefing); *Gerhardt* v. *Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002), appeal pending, No. 02-3270 (6th Cir. filed Aug. 6, 2003) (oral argument scheduled for Sept. 10, 2003); *Charles* v. *Verhagen*, 220 F. Supp. 2d 955 (W.D. Wis. 2002), appeal pending, No. 02-3572 (7th Cir.) (argued May 15, 2003); *Kilaab Al Ghashiyah* v. *Wisconsin Dep't of Corrs.*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003), petitions for permission to take interlocutory appeals granted, No. 03-8003 (7th Cir. Apr. 25, 2003) (held pending decision in *Charles* v. *Verhagen*, *supra*); *Williams* v. *Angelone*, No. 01-CV-00274 (W.D. Va. Mar. 31, 2003), appeal pending, No. 03-6758 (4th Cir. filed July 28, 2003) (held pending decision in *Madison* v. *Riter*, *supra*); *Beatty* v. *Johnson*, No. 02-CV-00506 (W.D. Va. Jan. 31, 2003), appeal pending, No. 03-6359 (4th Cir. filed May 5, 2003) (same).

moreover, the contours of the statute's terms and operation have only begun to be outlined through application and adjudication. Awaiting further experience in the implementation of the law would provide a more comprehensive and practical backdrop against which to evaluate the law's constitutionality.

2. Review is also unwarranted because the case arises in a profoundly interlocutory posture, such that a decision by this Court would have little practical impact on the litigation. "[E]xcept in extraordinary cases, the writ is not issued until final decree." See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citing additional cases). Compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the litigation), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review granted after final judgment). While interlocutory review is available for judgments denying Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), petitioners have abandoned their Eleventh Amendment challenge to RLUIPA by not presenting it in their petition. And they have abandoned that claim for good reason: the respondent prisoners seek only prospective injunctive relief against individual state officials, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), claims to which the Eleventh Amendment poses no barrier.

The only basis for appellate jurisdiction at this interlocutory stage thus is *not* the district court's denial of the motion to dismiss based on petitioners' constitutional challenge to RLUIPA. Petitioners instead predicate their request for interlocutory review on the district court's order continuing and supplementing an earlier entered preliminary injunction (Pet. App. 38-43).

See 28 U.S.C. 1292(a)(1). The problem for petitioners is that much of the relief afforded by that preliminary injunction antedates any reliance on RLUIPA in the litigation and, in fact, is separately predicated on the district court's assessment of the respondents' likelihood of succeeding on their *constitutional* claims. See Pet. App. 40-43. Resolution of petitioners' challenge to RLUIPA thus would afford petitioners no relief from those aspects of the preliminary injunction that prohibit petitioners from disciplining respondents or forcing respondents to forfeit good-time credits for attending Jumu'ah religious services. While the petition references a separate preliminary injunction concerning the length of prisoners' beards (Pet. 5), that injunction was not issued until seven months after the preliminary injunction at issue here, that judgment was not included in petitioners' appeal to the Ninth Circuit, and the propriety of that injunction was not addressed by the Ninth Circuit (Pet. App. 11).[7]

Thus, it is only one part of the preliminary injunction—that portion concerning the withholding of good-time credits for inmates attending Jumu'ah services (Pet. App. 46-50)—for which petitioners seek this Court's interlocutory intervention. Even if, against the full backdrop of this litigation, that one legal claim warranted the unusual step of interlocutory review by this Court, that isolated claim provides an awkward vehicle for evaluating RLUIPA's constitutionality. That is because the question before this Court will not be whether the lower courts' rulings of constitutional law

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[7] Indeed, the petitioners later filed a separate appeal of the district court's preliminary injunction pertaining to the grooming regulations, but petitioners voluntarily dismissed that appeal on February 26, 2003.

were proper, but whether the court of appeals properly found no abuse of discretion in the district court's evaluation of the respondents' likelihood of success on the merits, the irreparable harm faced by respondents, and the parties' competing equities. That latter inquiry, moreover, would itself be restricted by yet another unappealed injunction entered by the district court, in separate litigation between a California prison inmate and petitioner, the Director of the California Department of Corrections, requiring that petitioner to provide prisoners Excused Time Off from work details to attend Jumu'ah services. See Pet. App. 47-50 (explaining that the petitioner's obligation to comply with that earlier judgment influences the balance of equities component of the preliminary injunction inquiry).

In short, the present litigation is an inapt vehicle for deciding the constitutional questions raised by the petition, particularly in light of the dearth of appellate decisions resolving those same questions. See *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 582 (1979) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable.") (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Petitioner fails to demonstrate that any serious or irreparable harm will ensue from a denial of review at this stage. The fact that States and localities must comply with the law unless it is held to be unconstitutional (Pet. 7) does not itself warrant review. Such compliance is commonplace in a system that presumes the constitutionality of legisla-

tion and obliges parties to obey the law unless and until a court invalidates it.

3. The court of appeals' decision is a correct and straightforward application of this Court's precedents.

a. Petitioners contend (Pet. 8, 10) that RLUIPA violates the separation of powers because it adopts a more stringent standard of review than the standard that governs Free Exercise Clause claims generally under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), or prisoners' First Amendment claims under *Turner* v. *Safley*, 482 U.S. 78 (1987). But as long as there is a valid source of authority for the legislation, separation-of-powers principles do not prevent Congress from providing broader statutory protection for civil rights than the Constitution itself provides. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, and the Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.*, are but a few examples of laws that require States to afford individuals broader statutory protection for civil rights than the Constitution requires. Indeed, the Court in *Smith* expressly invited a legislative response to its decision. 494 U.S. at 890 (explaining that the Court's holding delineated only a constitutional floor, and that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation").

Petitioners' contention (Pet. 9-10) that the court of appeals' opinion conflicts with *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), misunderstands that decision. In *Flores*, this Court held only that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, as applied to state and local governments, exceeded Con-

gress's legislative power under Section 5 of the Fourteenth Amendment. 521 U.S. at 519-522. The decision did not hold that the statute also violated the separation-of-powers doctrine, as the courts of appeals have consistently recognized.[8]

b. Petitioners' argument (Pet. 12) that RLUIPA exceeds Congress's power under the Spending Clause fares no better. Nothing in the Constitution compels Congress to subsidize state programs that burden the exercise of constitutionally protected rights, unless the state conduct is itself barred by the Constitution. "The Federal Government has [the] power to fix the terms on which its money allotments to the States shall be disbursed." *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974). As with Congress's restriction on funding for programs that discriminate on the basis of race in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, the federal government has a legitimate interest in restricting the expenditure of federal funds for programs that engage in conduct that Congress believes to be contrary to the public interest and injurious to individual rights. See also *Grove City College* v. *Bell*, 465 U.S. 555, 575 (1984) (rejecting First Amendment challenge

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[8] See, *e.g.*, *Guam* v. *Guerrero*, 290 F.3d 1210, 1220-1221 (9th Cir. 2002); *Kikumura* v. *Hurley*, 242 F.3d 950, 958-960 (10th Cir. 2001); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 833 (9th Cir. 1999) ("Viewed in context, the Court's discussion [in *Flores*] of separation-of-powers principles did not serve as an independent basis for invalidating RFRA, as applied to state law, but was a corollary to the Court's conclusion that no Constitutional provision authorized Congress to pass RFRA with respect to the states."); *Adams* v. *Commissioner*, 170 F.3d 173, 175 (3d Cir. 1999) (RFRA continues to apply to the federal government), cert. denied, 528 U.S. 1117 (2000); *In re Young*, 141 F.3d 854, 859-861 (8th Cir.), cert. denied, 525 U.S. 811 (1998) (same).

to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept").[9] Imposing a condition on all the operations of a state agency ensures that federal funds, which are fungible, are not used to support the disfavored conduct.[10]

Beyond that, petitioners' suggestion that conditions imposed on federal funds must pertain to the "specific" (Pet. 12) subject matter of the program receiving the funds cannot be reconciled with this Court's precedent. See, *e.g.*, *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143-144 (1947) (upholding Hatch Act's broad mandate that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management").[11]

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[9] RLUIPA explicitly incorporates the Title VI (42 U.S.C. 2000d-4(a)) definition of a covered "program or activity," 42 U.S.C. 2000cc-5(6).

[10] See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002) (rejecting Spending Clause challenge to Rehabilitation Act), cert. denied, 123 S. Ct. 1353 (2003); see also *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.) ("money is fungible and its effect transcends program boundaries"), cert. denied, 525 U.S. 879 (1998).

[11] Although petitioners briefly assert that RLUIPA exceeds Congress's powers under the Commerce Clause (see Pet. 11), they make no specific arguments in support of that contention, and the court of appeals did not address the issue. See Pet. App. 15 n.2. The Commerce Clause question thus is not properly presented for this Court's review. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (Court ordinarily does not decide issues not resolved below).

c. Petitioners' argument (Pet. 13) that RLUIPA violates the Establishment Clause because it accommodates religious, but not secular, beliefs disregards this Court's precedent. The suggestion that "statutes that give special consideration to religious groups are *per se* invalid * * * run[s] contrary to the teaching of [the Court's] cases that there is ample room for accommodation of religion under the Establishment Clause." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987); see also *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705 (1994) (Court's cases "leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"). The alleviation of significant or "substantial" governmental interference with religious exercise is a permissible secular purpose, as long as Congress does not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335; cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.) (tax subsidy invalidated because it "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"). Exemptions from otherwise generally applicable statutes do not constitute impermissible governmental facilitation of religion, because the government neither adds to nor subsidizes the propagation of the religious message. See *Amos*, 483 U.S. at 338 (accommodation statute need not "come packaged with benefits to secular entities"). To hold otherwise would lead to the untenable conclusion that the Establishment Clause *forbids* States, as a matter of state constitutional or statutory law, from affording religious exercise (within

prisons or without) the same level of constitutional protection that this Court generally afforded religious exercise prior to *Smith*. That principle could imperil numerous state constitutional protections of religion. More broadly, that principle ignores the reality that, when government acts to remedy substantial burdens on religious exercise, it not only acts consistently with the Establishment Clause, it in fact, "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court Of The United States

EDWARD S. ALAMEIDA, et al.,
Petitioners,

v.

KARLUCK M. MAYWEATHERS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF OHIO AND 33 OTHER *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI* INTEREST

The *Amici* States do not lightly challenge a federal statute, but we are compelled to do so here. That is because the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") further complicates the States' ability to effectively manage prisons, a task that was already one of "the most vexing of all state responsibilities." *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 137 (1977) (Burger, C. J., concurring). The RLUIPA statute essentially replaces the constitutional standard of review for prisoner claims—namely, that prison regulations implicating religious exercise are valid if they are reasonably related to legitimate penological interests, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)—with a statutory standard that requires States to yield to prisoners' Free Exercise demands unless their regulations are "the least restrictive means of furthering a compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2). That least-restrictive-means test, as shown by experience under both the former Religious Freedom Restoration Act ("RFRA"), and now under RLUIPA, burdens States in at least two ways.

First, RLUIPA contributes to the great uncertainty about the legal standards controlling prisoners' Free Exercise demands. The law has changed dramatically in recent years, alternating between rational basis review and strict scrutiny three times in the last decade alone. That constantly changing legal environment adds significant complexity to the already difficult task of balancing the protective demands of the Eighth Amendment against the counter pressure of Free Exercise requirements.

But the number and magnitude of those changes are not the only sources of uncertainty. The least-restrictive-means test is itself so inherently unpredictable that it independently muddies the already-unclear waters. It simply does not, in the

correctional setting, tell States what is expected of them. That test has been tried twice before, and it twice left corrections officials guessing.

Before *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the least-restrictive-means test was applied in prisoner cases, and courts reached contradictory results as to the propriety of indistinguishable actions. *Compare Fromer v. Scully*, 817 F.2d 227 (2d Cir. 1987) (grooming regulations invalid) with *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987) (grooming regulation valid). *Compare also United States v. Huss*, 394 F. Supp. 752 (S.D.N.Y. 1975) (supplemental opinion) (special diet not required), *vacated on other grounds*, 520 F.2d 598 (2d Cir. 1975) with *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969) (special diet required). Indeed, that test was abandoned because "every administrative judgment [was] subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

The accuracy of that observation was reconfirmed by RFRA, which once again provided antithetical answers about the legality of identical policies. *Compare Diaz v. Collins*, 872 F. Supp. 353, 359 (E.D. Tex. 1994) (upholding grooming regulations); *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (same) with *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W. D. Ky. 1996) (invalidating grooming regulations); *Luckette v. Lewis*, 883 F. Supp. 471, 481 (D. Ariz. 1995) (same). Indeed, corrections officials received contradictory decisions about the same regulations in the same court, *Phipps, supra; Estep, supra.* That uncertainty undercuts the States' ability to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89.

Second, that uncertainty significantly complicates the job of combating prison gangs. "[O]fficials have noticed the common practice of prisoners 'adopting' [] religions . . . in order to get [] privileges." *Dangerous Convictions: An Introduction to Extremist Activities in Prisons*, 35 (Anti-Defamation League 2002). For example, "[w]hite supremacists in prison frequently claim adherence to religious sects . . . as a way to circumvent prison regulations," *id.* at 37, and they have openly advised their cohorts on how to abuse religious accommodations to further very unholy ends. *Id.* at 36. Inmates were quick to manipulate RFRA for such purposes, seizing on its strict scrutiny to undermine corrections officials' efforts to act against prison gangs. That pattern has re-emerged under RLUIPA, with white supremacists and other gangs invoking the Act in attempts to thwart previously validated anti-gang measures. The States need clear standards so they can confidently implement strategies for countering that problem, a problem that results in significant human suffering every day by inmates who lack the ability to flee the gangs' growing influence.

REASONS FOR GRANTING THE WRIT

California's petition should be granted for two reasons.

First, it presents an opportunity to end a period of unprecedented uncertainty about the legal standards controlling prisoners' Free Exercise claims—uncertainty that greatly complicates prison management.

Second, this Court should address the latest source of that uncertainty, RLUIPA, sooner rather than later because the present state of the law impedes the States' ability to address the increasingly urgent problem of prison gangs, a problem that causes very real human suffering every day. No further development is needed to fully address the purely legal issues involved. Finally, a decision here would help to resolve a growing number of other cases involving the questions presented here.

A. RLUIPA Has Once Again Changed the Legal Standard Governing Prisoner Free Exercise Claims, And The Latest Change Has Again Greatly Complicated Prison Administration.

Inmates' religious demands are a consistent aspect of correctional management, but the legal standards controlling those demands have been anything but consistent. The resulting uncertainty complicates the already difficult task of operating the nation's prisons and jails.

"Running a prison is an inordinately difficult undertaking that requires," among other things, "planning and the commitment of resources." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Officials charged with that daunting task must daily strike a "delicate balance . . . between the order and security of the internal prison environment" and prisoners' First Amendment rights. *Thornburgh v. Abbott*, 490 U.S. 401,

407 (1989). Further, officials cannot simply react to problems as they occur. They are duty-bound to "anticipate security problems and to adopt innovative solutions to [] intractable problems," *Turner*, 482 U.S. at 89, in order to meet their Eighth Amendment obligation to address readily foreseeable threats. *Helling v. McKinney*, 509 U.S. 25 (1993).

Corrections officials must therefore balance several variables, each with varying weights, when deciding what religious activities to permit in their institutions. "In making these decisions, prison administrators focus primarily on specific security risks." *Developments in the Law of Prisons: IV. In the Belly of the Whale: Religious Practice in Prison*, 115 Harv. L. Rev. 1891, 1899 (2002) ("*In the Belly of the Whale*"). However, they must also consider "the administrative costs of a policy, the likelihood of inmate resentment, the appearance of discrimination, and the possibility of inmates manipulating the system for personal advantage—all of which are, to some degree, security concerns." *Id.*

That multivariate correctional facility calculus is made exponentially more difficult when the governing legal standard is also an uncertain variable, as it has been for far too long.

A variety of standards were applied before *O'Lone*, ranging from deferential rational basis review to strict scrutiny, resulting in what one court accurately characterized as "an unholy mess." *Udey v. Kastner*, 805 F.2d 1218, 1219 n.1 (5th Cir. 1986). *O'Lone* provided welcome guidance with its modified rational basis standard, but that stability was short lived.

A sea change occurred with the enactment of RFRA's least-restrictive-means standard in 1993. That prompted thousands of internal, and hundreds of judicial, demands to reexamine operational issues previously settled under the *O'Lone* standard. That period of reexamination lasted for

three-and-a-half years, until RFRA was struck down in June 1997, effectively reinstating the *O'Lone* standard. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

Things once again changed dramatically when RLUIPA became effective in September 2000. That law reinstates the same strict scrutiny standard imposed by RFRA and, like RFRA, has prompted reexamination of previously settled operational issues

In sum, the standards for evaluating prisoners' religious demands, demands that must be evaluated everyday in the nations' prisons and jails, have fluctuated wildly in recent years. The controlling standard has swung from one end of the legal continuum, rational basis review, to the other, "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534, and the pendulum has swung three times over the last decade alone.

Reasonable people can disagree over Congress's constitutional authority to modify this Court's constitutional holding in *O'Lone*, but surely all agree that the frequent and dramatic swings in the law poorly serve all concerned. Consequently, the Court should act to end that unusual uncertainty by reviewing the validity of RLUIPA now, and by definitively establishing the law controlling prisoners' Free Exercise claims.

B. This Court Should Grant Review Now.

While the Ninth Circuit was the first court of appeals to address the constitutionality of RLUIPA, the Court should review this case now, rather than wait for further percolation in the courts, for several compelling reasons. First, the continuing uncertainty in this area impedes the States' ability to combat an increasingly urgent problem that causes significant human suffering every day—prison gangs. Further, nothing would be gained by delay, because the questions presented in California's petition are purely

legal, and hence need no further development in other cases. And prompt review of this issue would help to resolve a growing number of cases involving the questions presented.

1. Uncertain Legal Standards Impede The States' Ability To Address The Increasingly Urgent Problem Of Prison Gangs.

Prompt action to restore stability in this frequently visited area of the law is supported by the very real, and very dangerous, consequences of waiting. The uncertainty just discussed interferes with the States' ability to respond to the urgent problem of prison gangs, a problem with indisputable connections to both violence and "religious" activity behind bars.

It is hard to overstate the adverse impact of prison gangs. "The types of problems created by gangs include the introduction and distribution of drugs; intimidation of weaker inmates; extortion . . . ; requests for protective custody status; violence associated with gang activity; occasional conflicts between gangs (usually racial) that create disturbances and contracted inmate murders." G. Camp & C. Camp, *Prison Gangs: Their Impact, Nature and Impact on Prisons* (U.S. Dept. of Justice 1985) xi.

And those problems are not just administrative inconveniences. Prison gangs are responsible for violent acts that result in very real human suffering. *See, e.g., Fraise v. Terhune*, 283 F.3d 506, 512-513 (3rd Cir. 2002) (detailing the history of violence by a prison gang claiming religious status); *In re Long Term Segregation*, 174 F.3d 464, 466-467 (4th Cir. 1999) (same); *Johnson v. Martin*, 2002 U.S. Dist. Lexis 19246 (W.D. Mich. 2002), slip op. at **27-29 (same).

Those problems are increasing. Half of the respondents to a recent national survey of wardens reported a gang-related disturbance at their prisons within the year preceding the survey. G. Knox, *A National Assessment of Gangs and*

Security Threat Groups In Adult Correctional Institutions: Results From The 1999 Corrections Survey, Journal of Gang Research, Vol. 7, No. 1 (Spring 2000) 19. The percentage of respondents reporting gang-based assaults on prison staff more than tripled during the 1990s. *Id.* at 6-7. Fifty-five percent of respondents reported a significant gang-driven increase in homemade weaponry in their prisons, and supermajorities of respondents expect gang-related violence and related operational problems to increase in coming years. *Id.* at 26, 40. "Among the major warning signs that emerge from this study is that the vast majority of prison wardens at adult state correctional institutions do in fact believe that in the next few years the gang problem will dramatically increase behind bars." *Id.* at 40.

Unfortunately, prison gangs and religious activities are frequently connected. Prisoners' exploitation of the special protection given religious expression for less than holy purposes is well known on a general level, *In the Belly of the Whale*, 115 Harv. L. Rev. at 1902, 1906, 1908; *Udey*, 805 F.2d at 1220, 1221, and all involved in corrections recognize that gang-affiliated prisoners are particularly adept at manipulating those protections.

Reliable institutions verify the pattern of prison gangs exploiting Free Exercise protections. That pattern has been documented in a study commissioned by the federal Justice Department, a letter joined by all 50 state correctional administrators and a national survey of State Attorneys General. *See* G. Camp & C. Camp, *supra*, at 120, 141, 154, 155, 158, 175; *Congressional Record* S 14355 (daily ed. October 26, 1993); *Preliminary Results of the RFRA Survey of All States: The Impact of the Religious Freedom Restoration Act on State Correctional Facilities* (Florida Atty. Gen. 1996). The courts have likewise acknowledged that challenging reality. *See, e.g., Fraise*, 283 F.3d at 517; *Morris-Bey v. Debruyn*, 1997 U.S. App. Lexis 22440 (7th Cir. 1997), slip op.

at *3; *Johnson v. Martin*, 2002 U.S. Dist. Lexis 19246 (W.D. Mich. 2002), slip op. at **28-29: Academics, law enforcement professionals and civil liberties groups have also verified it. *See* G. Knox, *An Introduction to Gangs* (Wyndham Hall Press 1994) 27; R. Bonner, *The Brotherwoods: The Rise and Fall of a White Supremacist Gang Inside a Kansas Prison*, Journal of Gang Research, Vol. 6, No. 3, 72 (Spring 1999); *Behind the Walls: An Expert Discusses the Role of Race Related Gangs and Other Extremists in America's Prisons*, Southern Poverty Law Center Intelligence Report (Winter 2002) 26-27; *Dangerous Convictions: An Introduction to Extremists Activities in Prisons* (Anti-Defamation League 2003) 7, 34-35, 37. One expert put it well: "[g]ang members in prison know this routine: they go to chapel to act like they are a prayer group, but it is just a meeting place for the gang members to transact business." Knox, *An Introduction to Gangs*, *supra*, at 27.

The most persuasive proof comes from the gangs themselves. More than a third of the gang-affiliated prisoners surveyed admitted that their groups had used "religion as a 'front' for gang business." B. Zaitzow & J. Houston, *Prison Gangs: The North Carolina Experience A Summary of the Findings*, Journal of Gang Research, Vol. 6. No. 3 (Spring 1999) 29. A recent study of extremist groups in prisons provides a good example:

> An editorial in a recent issue of [a white supremacist publication targeting prisoners] sums up why [religion] has become important to incarcerated extremists: "This issue of *Strife* comes to you with a purpose, which is to encourage Bruder within the gulags to file an affidavit with their institutional chaplain requesting to be recognized as believers in Asatru (also known as Heathenism). This is necessary if we want to have a place within

> these dungeons where our people can congregate for educational purposes. Those of you who are not Odinists, we hope you will participate in and support this. The opportunity to congregate with our Folk is beneficial to all of us."

Dangerous Convictions, *supra*, at 38.

The lack of knowable Free Exercise standards is a significant impediment to the States' ability to respond to that troubling phenomenon. Between the uncertainty of what measures permissible under *O'Lone* will survive RLUIPA's least-restrictive-means test, and the inconsistent results between cases involving that test, officials are simply unsure what actions they may legally take to limit gang activities.

And the gangs know it. Gang-affiliated inmates were quick to exploit the uncertainty created by RFRA's seismic change in controlling legal standards and were persistent in manipulating RFRA to cast doubt upon anti-gang measures. *See, e.g., In re Long Term Segregation*, *supra*; *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996); *Rojas v. Cambra*, 1997 U.S. Dist. Lexis 7610 (N.D. Cal 1997); *Morris v. Debruyn*, 1996 U.S. Dist. Lexis 11165 (N.D. Ind. 1996), *aff'd*, 124 F.3d 204 (7th Cir. 1997) (table). That pattern has re-emerged under RLUIPA, with white supremacist and other gangs invoking the Act in attempts to thwart anti-gang practices validated under the *O'Lone* standard. *Compare Gerhardt v. Lazaroff*, 221 F. Supp.2d 827 (S.D. Ohio 2002) (denial of separate group services for white supremacist inmates) *with McCabe v. Arave*, 827 F.3d 634 (9th Cir. 1987) (upholding such denials under the *O'Lone* standard) and *Ballard v. Campbell*, 1999 U.S. App. Lexis 23309 (6th Cir. 1999) (same). *Compare also Johnson v. Martin*, 223 F. Supp.2d 820 (W.D. Mich. 2002), and *Marria v. Broaddus*, 200 F. Supp.2d 280 (S.D.N.Y. 2002) (challenging increased restrictions on inmates adhering to "religious" groups with a history of gang affiliated violence) *with*

Fraise v. Terhune, 283 F.3d 506, 512-513, 517 (3d Cir. 2002) (upholding such restrictions under the *O'Lone* standard) and *In re Long Term Segregation*, 174 F.3d at 466-467 (same).

That uncertainty is compounded by the inherent unpredictability of the least-restrictive-means test. For example, prison officials know that some gangs use "religious" literature for various illicit purposes, they know that excluding that literature from prisons reduces violence, and they know that exclusion is therefore permissible under the *O'Lone* standard. But they do not know whether they can continue that practice, because they have received inconsistent decisions about the propriety of that action under the least-restrictive-means test. *Compare George v. Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) *with Lawson v. Dugger*, 844 F. Supp. 1538 (S.D. Fla. 1994). Officials also know that gangs use jewelry and long hair as non-verbal "identifiers," that restricting access to those things impedes gang activities, and that they could take that preventive action under the *O'Lone* standard. But the continued propriety of that prophylactic measure under the least-restrictive-means test is unclear. *Compare Alameen v. Coughlin*, 892 F. Supp. 440 (E.D.N.Y. 1995) (invalidating an policy prohibiting religious article potentially used as a gang identifier under RFRA) with *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) (upholding grooming regulation under RFRA intended to limit use of hair as a gang identifier).[1] That inconsistency proves the truth of this Court's observation that prison officials cannot be sure of any action surviving least-restrictive-means analysis because "every administrative judgment

[1] Although the anti-gang measure at issue in *Hamilton* was ultimately sustained on appeal, its operation was enjoined for almost two years, putting inmates and staff at risk during that period. *See Hamilton v. Schriro*, 863 F. Supp. 1019 (W.D. Mo. 1994).

[is] subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner*, 482 U.S. at 89.

"Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs . . . fueled by . . . religious bigotry," *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996), and no one can reasonably deny that such "religious" groups are responsible for numerous, and extremely serious, acts of violence in prisons across the country. The cumulative result of those hard realities and the constantly changing legal standards is less control, and hence more potential for violence, in the nation's prisons. Review can eliminate that uncertainty. And given the potential for additional, significant human suffering each day that uncertainty exists, this Court should act sooner rather than later.

2. The Questions Presented Are Ripe For Review Without Further Development, And Review Would Help To Resolve A Growing Number Of Cases Turning On Those Questions.

The Amici States recognize that the decision below is the first circuit-level precedent on RLUIPA's constitutionality, and of course, it is often appropriate to allow various factual patterns relevant to a challenged statute to be explored in the lower courts before this Court grants review. However, we submit that there are two reasons why that approach would not be appropriate here.

First, the nature of the questions presented belie the need for further factual development. Those questions are purely legal and turn on the constitutional boundaries of

Congress's power. Those boundaries are set by the Constitution, as interpreted in this Court's prior decisions, and additional factual development will not be relevant.

Second, review now will resolve many pending cases, or at least greatly aid in their resolution. Cases involving the same Separation of Powers, Spending Clause or Establishment Clause challenges to RLUIPA's prison provisions presented here are currently pending in many lower federal courts. *See* Appendix A. Review in this case could well resolve, or at least aid in the resolution of, those cases, alleviating their burdens on those courts.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant California's petition.

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APPENDIX

Table of federal cases involving
one or more of the questions presented

First Circuit

Gordon v. Pepe, Case No. 1:00CV10453 (D. Mass)

Third Circuit

Williams v. Bitner, Case No. 01-2217 (M.D. Pa.)

Gerlach v. N.J. Dept. of Corrections, Case No. 99-4699 (D.N.J.)

Fourth Circuit

Madison v. Ritter, Case No. 03-6362 (4th Cir.)

Sixth Circuit

Cutter v. Wilkinson, Case No. 02- 3270 (6th Cir.)

Johnson v. Martin, Case No. 2:00CV75 (W.D. Mich.)

Mann v. Wilkinson, Case No. C2-00-706 (S.D. Ohio)

Seventh Circuit

Charles v. Verhagen, Case No. 02-3572 (7th Cir.)

Ghashiyah v. WI Dept. of Correction, Case No. 03- 2193 (7th Cir.)

Goodman v. Snyder, Case No. 2000-C-498 (N.D. Ill.)

Eighth Circuit

Jones v. Norris, Case No. 5:0CV415 (E.D. Ark.)

Love v. Evans, Case No. 2:00CV91 (E.D. Ark.)

Tenth Circuit

Hammonds v. Saffel, Case No. 02-5009 (10th Cir.)

Ind. v. Wright, Case No. 00-B-428 (D. Colo.)

Eleventh Circuit

Benning v. State of Georgia, Case No. CV602139 (S.D. Ga.)

Wayne v. Wetherington, Case No. 5:02CV0460-02 (M.D. Ga.)

Limbaugh v. Thompson, Case No. CV93-D-1404-N (M.D. Ala.)

Hornsby v. State of Alabama, Case No. CV 95-T-385-N (M.D. Ala.)